THE BENEFIT / PENALTY UNIT IN INCOME TAX POLICY: DIVERSITY AND REFORM

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EXECUTIVE SUMMARY

As family structures have become increasingly diverse, so to have the legal forms recognizing those relationships. Common-law cohabitation, deemed spousal status, registration systems, civil unions, and reciprocal beneficiary elections are new legal forms that offer adults additional choices or may even replace formal marriage as the only 'status' that relationships can assume.

Diversity in family forms and in legal relationships has of course led to scrutiny of government policy, particularly to the connection between legal relationship status and tax burdens, eligibility for government retirement benefits, and other contexts in which the couple has often been used as the basic unit of tax and transfer policy.

Internationally, those countries that have gone the furthest in recognizing diverse relationships -- for example, by recognizing lesbian and gay relationships -- have noticeably shifted away from using the couple as the basic unit of income tax and benefit policy, and have increasingly begun to adopt the individual as the basic policy unit.

Canadian families have become increasingly diverse over the last quarter century. However, in contrast with developments in other countries that have begun to embrace diversity, Canadian income tax and transfer incomes policies have actually moved significantly in the opposite direction -- toward using the couple as the basic unit in government policy in *increasing* numbers of programs.

This study examines how using the couple *versus* the individual as the tax/benefit unit in federal law affects the distribution of income. Five categories of law are considered: (1) provisions that

extend benefits for supporting economically-dependent adults; (2) provisions that supplement family income; (3) provisions that affect ownership of family property; (4) anti-avoidance provisions; and (5) provisions designed to limit access to low-income, child support, and poverty relief measures in various ways.

It is found that although Canadian law has become almost completely sex-, race-, and sexuality-neutral, expanded use of the couple as the basis for allocating the tax burden and government benefits contributes to the poverty of low- and low-middle-income adults at the same time that it unnecessarily enhances the economic power of higher-income adults. It is projected that if all co-resident adults were treated as spouses, they would lose $200 million in valuable tax benefits and transfer payments in the year 2000.

At the low end of the income scale, using marriage or deemed spousal status to limit benefits such as the child benefit, the GST credit, the child care expense deduction, and unemployment benefits contributes to the poverty of lower-income individuals. Similar patterns can be observed in direct expenditure welfare or retirement income transfer programs. At the higher end of the income scale, tax benefits such as the dependent spouse credit and transferable credits disproportionately benefit non-raced heterosexual couples who can afford to live on one income.

These trends are particularly disadvantageous for women, people of colour, disabled adults, lesbian and gay couples, those responsible for children, and low-income Canadians. At a time when the emphasis in legal and social policy has been on eliminating discrimination in a diverse society by promoting equality, inclusivity, and equity -- both within the family and among individuals in Canadian society -- these developments mean that federal tax and benefit policy has become less neutral toward choices of relationships than it has been in the past.

Drawing on tax policy literature, econometric studies, data on Canadian households, and microsimulation to evaluate competing alternatives for reform, this paper makes 12 recommendations on how to remove these non-neutralities from federal relationship law. These recommendations include:

(i) Repeal the married and transferable credits;

(ii) Replace the dependent spouse credit with enriched state support for children;

(iii) Reduce the regressivity of the lower income tax rates;

(iv) Repeal the alimony deduction;

(v) Extend tax exemption of employee benefits to non-spouses;

(vi) Retain spousal limits on income-splitting retirement provisions;

(vii) Permit couples to transfer property and incomes among them on a deferred-income basis as consistent with equitable ownership;

(viii) Rollovers should not be extended to nonfamilial or non-conjugal adult relationships;

(ix) Allocate low-income tax and transfer benefits to individuals and not on the basis of relationship status or family income concepts;

(x) Bring legal presumptions about inter-couple transactions into line with equitable family property doctrine;

(xi) Repeal statutory non-arm's length presumptions based on adult relationships; and

(xii) Offer restitution to women disqualified from CPP and EI coverage by now-repealed family attribution rules.

These recommendations eliminate 'the tax on marriage' and its common-law equivalent, 'the tax on cohabitation,' as well as other types of penalties on cohabitants or others in adult relationships. The result is that legal policy can become more neutral toward the decision to marry, to cohabit, or to form other relationships, and that tax and benefit provisions will not force couples to chose between forming diverse relationships based on mutual respect and varying degrees of autonomy *versus* losing valuable tax/transfer benefits or giving up the relationship out of financial need.

Using the individual as the basic unit of government tax and transfer policy brings Canadian income tax and transfer policies into line with the growing trend internationally toward use of the individual as the fundamental unit of legal policy. It is also a critical step in the process of taking the state out of the business of regulating or promoting certain types of relationships. Relationship-neutral laws reduce administrative costs and the complexities of legal provisions. They make it possible to extend greater privacy to all adults. They free people in relationships from intrusive investigation by the state, and they give people more genuinely free choices in creating their own intimate relationships.

Canadian tax policy has already progressed quite a distance down the road to 'unlinking' tax/transfer provisions from formal marriage itself. As the demand for access to marriage by lesbian and gay couples meets up with concern for support of extended family members, respect for non-conjugal relationships, and allocation of property and incomes on equitable principles, relationship-neutral benefits and tax provisions ensure that as those changes take place, they will not have unintended consequences or create new forms of discrimination.

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CHAPTER ONE

NATURE OF TAX / BENEFIT UNIT ISSUES

The basic unit of legal policy is the individual human being.[1] Nonetheless, federal legislation has always exhibited some ambivalence over whether legal policy should be framed strictly around individuals, which would render adult relationships irrelevant to legal policy, or whether some relationships should be taken into consideration in some circumstances.

This ambivalence is clearly reflected in early debates over whether the first income tax statute enacted in Canada -- the *Income War Tax Act*, passed to finance Canada's involvement in World War I -- should treat all individual taxpayers alike, or whether those with families should be given special benefits. The Minister of Finance initially proposed that all taxpayers be given the same personal exemptions without regard to marriage or family composition. The individual was eventually adopted as the basic income tax unit, but in the ensuing debates, the government was pressured into giving special tax benefits to married men. At the same time, those who wanted formal marriage to be given special status successfully overpowered those

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[1] This fundamental legal concept is so deeply embedded in the legal imagination that when the courts and legislatures concluded that corporations were to be given legal existence, they were invested with full 'legal personality' by deeming them to have the 'full powers of a natural person'.

who suggested that household composition was so diverse that no special benefits should be given only to married men.[2]

As the result of this policy decision, Canada has used the individual as the starting point for federal benefit programs, but has consistently added on special joint or marital provisions like the married exemption in income tax legislation. Thus, the Canadian individual model has become a hybrid that resembles the joint or marital model in many regards. This hybridization affects a large number of government laws and programs. At the federal level, some 70 statutes dealing with everything from income taxation and immigration to social security, civil service and veterans' pensions, commodities taxes, criminal evidence, divorce, Aboriginal peoples, and unemployment insurance benefits all contain special rules relating to married or cohabiting couples, and many statutes also make special provision for other types of relationships as well. Similar numbers of provisions exist at the provincial and territorial level.

Not all of the special joint provisions relating to married or cohabiting couples affect them in the same way. Many joint provisions offer special benefits to couples, like the spousal credits still offered in the *Income Tax Act*. Other joint provisions, however, actually penalize married or cohabiting couples. For example, the single supplement given to unattached individuals in the Goods and Services Tax credit (GST credit) is not available to married or cohabiting couples.

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2 The government had originally decided that instead of trying to calibrate exemptions to marital status, family size, or number and type of dependents, it would be better to offer all taxpayers generous individual exemptions on the assumption that most adults have some support obligations. See Canada, House of Commons, Debates and Proceedings, 7th Sess., 12th Parl., IV: 4102, 4103 (August 3, 1917), Thomas White. This approach was attacked vigorously on the basis that this would unfairly benefit single men, who would escape 'too lightly,' 'spinsters,' who were assumed to have no dependents, and married women, who were 'free' to work for wages or 'save a lot of disbursements' by working in the home. *Ibid.*, IV: 4103, Mr. Verville; 4105, Mr. Knowles. There was a definite animosity toward men who remained unmarried even though 'it is not their fault.' *Ibid.*, IV: 4104, Mr. Graham.

Denial of the single supplement to married or cohabiting couples, thus, can be said to impose an implicit 'tax on marriage' on them even if they have extremely low incomes.[3]

The mix of joint benefit and joint penalty provisions found in the Canadian hybrid individual legal system has not remained static since it first came into existence. Two long-term trends have unfolded over the last century. One trend has been the extension of spousal treatment to non married couples and, in some circumstances, to people in non-conjugal relationships. At the outset, only married couples were eligible for tax and direct government benefits. Over time, there has been sporadic movement away from the 'marriage only' model of joint benefits and toward the more egalitarian definition of qualifying relationships.

Most expanded relationship provisions relate to sex-based or conjugal types of relationships. Beginning in 1919, common-law spouses were recognized for purposes of some federal pensions.[4] In the early 1970s, following the recommendations of the Royal Commission on the Status of Women, most federal pension plans were revised to permit common-law wives to receive survivor benefits.[5] In 1993, prompted by the comments of human rights tribunals and the prospect of more litigation under the equality guarantees of the *Canadian Charter of Rights*

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3 For analytic purposes, direct government expenditures and tax benefits are functionally equivalent. For a discussion of 'tax expenditures,' see Canada, Department of Finance, Government of Canada Tax Expenditures, 1997 (Ottawa: Dept. of Finance, 1997).

4 *Pension Act*, 9-10 George V, c. 43, s. 33(3), gave common-law wives rights to their husbands' pensions.

5 By 1970, the Canada Pension Plan, Old Age Security pensions, and seven other federal superannuation plans and publicly-funded pensions and veterans' programs recognized common-law wives. See Henri Major, Notes on Selected Federal Statutes Recognizing Common-Law Relationships (Ottawa: Advisory Council on the Status of Women, 1975) 1-2, Appendix A. This number increased in the 1970s and 1980s.

and Freedoms, the federal government eliminated the distinction between unmarried and married couples for purposes of all the spousal provisions in the *Income Tax Act*.[6]

In the 1990s, lesbian and gay couples also began to be recognized in law. In 1995, the Supreme Court of Canada confirmed a number of lower court decisions that had ruled that excluding lesbian and gay couples from common-law spousal provisions can violate section 15(1) of the Charter.[7] In 1998, lesbian and gay couples were finally given access to survivor benefits under employee pension plans regulated via federal income tax legislation,[8] and in 2000, spousal treatment was extended to lesbian and gay couples in most federal statutes.[9]

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6 *Income Tax Act*, R.S.C. 1985 (5th Suppl.), c. 1, s. 252(4), added by S.C. 1993, c. 24, section 140(3), applicable after 1992.

7 See *Egan and Nesbit* v. *The Queen* (1991), 87 D.L.R. (4th) 320, 30 A.C.W.S. (3d) 979 (F.C.T.D.), per Martin J., aff'd (1993), 103 D.L.R. (4th) 336 (F.C.A.), per Mahoney and Robertson JJ.A., Linden J.A. dissenting, aff'd [1995] 2 S.C.R. 513 (S.C.C.) (but note that Court concluded that the government could continue to 'justifiably' deny spousal pension allowance under the federal *Old Age Security Act* to lesbian and gay cohabitants). In a companion case, the Court ordered that heterosexual cohabitants receive the full benefits of insurance legislation. See *Miron* v. *Trudel*, [1995] 2 S.C.R. 418.

8 Recognition of lesbian and gay couples remained very weak in federal law until 1998. As early as 1989, a Federal Court Trial Division judge had applied section 15(1) of the Charter to permit a gay inmate's partner to participate in the family visitation program. The Court of Appeal vacated the Charter basis for the order and merely read the Corrections policy 'as if' it included the gay partner. See *Veysey* v. *Correctional Service of Canada* (1990), 109 N.R. 300 (F.C.A.), per Iacobucci, C.J., Urie and Decary JJ., aff'g on different grounds (1989), 29 F.T.R. 74. Aside from the rulings in *Egan and Nesbit*, the only other ruling by a court on a federal statute is *Rosenberg* v. *A.-G. Canada* (1995), 25 O.R. (3d) 612 (Ont. Gen. Div.), per Charron J., rev'd [1998] O.J. No. 1627 (O.C.A.) (QL), per McKinley, Abella, and Goudge JJ.A. (employee pension plan survivor options). However, the Supreme Court ruled on almost exactly the same statutory provision in *M.* v. *H.*, [1999] 2 S.C.R. 3, which arose out of provincial family law. Other issues have gone before federal tribunals.

9 An Act to modernize the Statutes of Canada in relation to benefits and obligations, Canada, 36th Parl., 2nd Sess., S.C. 2000, c. 12 (Bill C-23) (Royal Assent received June 29, 2000, not in force until proclaimed). Parallel changes have taken place in three provinces. British Columbia has been expanding its spousal provisions to include lesbian and gay couples since the mid-1990s. Quebec extended spousal treatment to lesbian and gay couples as well as to heterosexual cohabitants for public law purposes (but not for purposes of the Civil Code marital provisions) in Bill 32 in June 1999, and Ontario enacted the *M.* v. *H.* Act extending spousal treatment to a new class of 'same-sex partners' in 1999.

Less visible has been the gradual expansion of many federal benefit provisions to non-conjugal relationships such as parent-child, brothers and sisters, or nieces and nephews, and in some situations, to companions or friends.[10] Some of these changes have been designed to make it possible for lesbian and gay couples to pass themselves off as 'friends' without having to disclose their sexuality or the intimate nature of their relationships. Other of these changes reflect the value given to kinship, and some proponents advocate extension of spousal treatment to all relatives or adult pairs because they contend that there is no difference between those pairs and lesbian/gay couples.[11]

The second major trend has been the increasing use of 'the couple' as the basic policy unit in federal law.[12] This policy of treating married couples and other adults in conjugal relationships as being 'merged' into a 'couple' or 'marital unit' has its origins in the English common-law doctrine of coverture, which posited that the legal and economic existence of a woman merged

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10 At least a hundred federal income tax provisions look not only to spousal status but to other forms of relationship, including 'family' relationship. See Appendix A for this list of provisions. These relationships include parent, child, brother/sister, grandparent, aunt/uncle, niece/nephew, family, and 'related person,' a catch-all category that is fact-based as well as defined. When taxpayers are spouses or common-law partners, people on both sides of the couple are considered to be the family or brother/sister, etc., of each spouse or partner.

11 One of the earliest discussions of the rights and responsibilities of non-conjugal relationships is in *Andrews* v. *Ontario (Minister of Health)* (1988), 64 O.R. (2d) 258 (H.C.J.), per McRae J., in which the court adopted the province's submission that excluding lesbian couples from family health coverage was not discrimination because 'they are treated the same way as a multitude of other relationships such as family units consisting of adult siblings, extended as well as various combinations of unrelated heterosexual or homosexual adults with and without children.' The rights and responsibilities of non-conjugal couples are almost routinely invoked whenever legal recognition of lesbian and gay couples is in issue. However, some feminist scholars have pursued this issue out of recognition that many caring obligations fall heavily on women, yet are not supported by the state.

12 Between 1967 and 1987, some fifteen new policy areas in the *Income Tax Act* alone were linked to spousal status. These provisions are tabulated in Jack R. London, 'The Impact of Changing Perceptions of Social Equity on Tax Policy: The Marital Tax Unit' (1988) 26 Osgoode Hall L. J. 287 at 298-301. Because most provinces have incorporated the federal *Income Tax Act* into provincial legislation by reference under the terms of the tax collection agreement, each extension of spousal treatment and each new spousal provision is replicated in each participating province as well.

with that of her husband when she became 'covered' by him through marriage. From a policy perspective, treating couples as a 'joint unit' has consistently disadvantaged women. For example, until the early 1980s, women who worked in family businesses were not permitted to treat their earnings as their own, which not only reduced their access to financial resources but also made it impossible for them to contribute to unemployment, private retirement, and public retirement plans. At the present time, there are numerous other joint provisions that operate in the same fashion as the GST 'tax on marriage,' including the equivalent to married credit, the child tax benefit, and the child care expense deduction. In all these provisions, individuals actually receive larger benefits than couples.

It is the combined effect of these two trends -- extension of spousal treatment to diverse relationships and expanded use of joint income concepts to allocate government benefits -- that is the focus of this study. This 'more couples + more joint provisions' trend in federal tax and transfer policy leaves a distinct fiscal 'footprint' -- it produces larger government revenues, and those revenues increase because spousal treatment generally reduces the size of benefits receivable by low-income people. Single parent families, low-income dual-earner families, and women are particularly affected by this overall reduction in benefits, as are all other people whose incomes are affected by their race, ability, sexuality, or economic class.

This distinctive 'fiscal footprint' was documented by Statistics Canada in a microsimulation that explored what would happen if married-couple families were treated as unmarried-couple families.[13] The results demonstrated that spousal treatment reduced the disposable income of 58 per cent of those families. Less than 2 per cent were unaffected by the change, and only 29

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[13] Richard J. Morrison and Jillian Oderkirk, 'Married and Unmarried Couples: The Tax Que$tion' (1991) Canadian Social Trends 15-20. This microsimulation was for the 1989 year.

per cent enjoyed higher disposable incomes because they were married. The revenue gain to the government flowing from spousal treatment was $3.5 billion, at the rate of $1,560 in additional taxes per family. Not all families are affected by spousal treatment to the same extent. Families with children under 18 had the greatest reductions in disposable income -- $2,058 -- followed by families with at least one elderly spouse -- $708. The largest losses in income were concentrated in the low- to middle-income categories. The net average loss of consumable income (averaged across all families) was $570 per year.

Net consumable after-tax income fell because being classed as married cost this group of families $2.0 billion in the child tax credit, $1.7 billion in guaranteed income supplement payments, $0.6 billion in sales tax credits, and $0.3 billion in provincial tax credits. While some of these spouses did receive the spouse's allowance under the *Old Age Security Act*, this gain was offset by overall higher federal and provincial taxes.

For the purposes of this study, the fiscal impact of being treated as spouses was simulated for two different groups of unmarried individuals. One group was comprised of same-sex adults who lived together in separate economic households (Statistics Canada terminology for single individuals who share space) and whose ages, occupations, and other characteristics were not inconsistent with presumed lesbian or gay relationships (the 'tight screen'). The second group consisted of all same-sex adult pairs unscreened by age or other characteristics (the 'loose screen'). When each of these pairs were treated as spouses for tax and transfer purposes, their federal transfers fell by 13 to 14 per cent, their total taxes fell by just 1 per cent, and when transfers and taxes were offset, their net losses were on the order of 5 to 7 per cent.[14] The

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[14] See Appendix B for these results.

'loose screen' group, which was larger than the 'tight screen' group, experienced greater losses of total spending power than did the smaller group.

Approximately half the transfer losses flow from federal transfer programs -- the child benefit, Guaranteed Income Supplement (GIS) benefits, and GST credit are the largest. Losses from provincial transfer programs and losses of refundable provincial tax credits are each of the same magnitude. Federal transfer and tax provisions drive many provincial programs, which means that the cause of some two-thirds of the net loss caused by spousal treatment derives largely from the provisions of federal income tax legislation. Other tax provisions affect this overall picture, but are relatively smaller than the major items listed above; the distributional impact of the most important of these is discussed in chapters four and five. On an aggregate level, however, it can be noted that the larger the group of adult pairs, the more women appear in the lowest income categories and the fewer appear in the higher income categories. This suggests that the relatively greater poverty of women and of other disadvantaged groups makes it more likely that they will be disproportionately affected by the 'fiscal footprint' left by the 'more couples + more joint provisions' trend in tax and transfer policy.

The academic literature has reflected growing concern over this trend.[15] But because the extension of spousal treatment has been sought through litigation by people seeking to be 'let in'

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15 Several writers have drawn attention to how spousal treatment will negatively affect low-income heterosexual, lesbian, and gay couples when seeking medical coverage, social assistance, and other government benefits. See David Sherman, 'Till Tax do us Part: The New Definition of "Spouse"' (1992) 20 Canadian Tax Foundation Conference Report 1; Patricia LeFebour, 'Same Sex Spousal Recognition in Ontario: Declarations and Denial -- A Class Perspective' (1993) 9 Journal of Law and Social Policy 272; Shelley Gavigan, 'Paradise Lost, Paradox Revisited: The Implications of Familial Ideology for Feminist, Lesbian and Gay Engagement to Law' (1993) 31 Osgoode Hall L.J. 589; Claire Young, 'Taxing Times for Lesbians and Gay Men: Equality at What Cost?' (1994) 17 Dalhousie L. J. 534; Kathleen Lahey, 'The Political Economies of 'Sex' and Canadian Income Tax Policy' (Toronto: CBA(O), 1998); Kathleen Lahey, *Are We 'Persons' Yet? Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1999) chapters 8 and 9.

to what have been seen as lucrative benefit programs, there has been little political or judicial discussion of the regressive impact such changes will have on some groups. Indeed, the emphasis on benefits and not on penalties is very much a product of the nature of equality litigation itself. Judicial decisions such as *Miron* v. *Trudel* and *M.* v. *H.* have had to employ a substantive analysis of the meaning of 'equality' simply in order to be able to strike down what are essentially facially discriminatory provisions. The facts presented in *Miron* did not involve any potential 'penalty' effect in any event, because the case revolved around extending spousal insurance benefits to common-law couples. The 'penalty' effect of extending spousal support obligations litigated in *M.* v. *H.* was really a private law type of 'penalty' and the decision clearly revolved around equitable principles. H. was required to share income capacity in which M. had an equitable interest; neither party was denied a state-funded benefit.

In any event, courts really cannot carry out an overarching contextual analysis of the potential implications of rulings like these for unrelated policy contexts. Courts can rule only on the facts before them. The essence of 'common-law' reasoning is that principles arise out of specific factual and legal contexts and change is generated by testing those principles out in a series of different factual/legal contexts.

The dilemma that exists at the present time is that now that courts have initiated the expansion of spousal treatment on the grounds of non-discrimination, legislatures have responded not with the kind of over-arching contextual analysis that is the next logical step in the law reform process, but with legislation that extends spousal treatment on an across-the-board basis without any real reference to the impact that relationship recognition has on benefits and

penalties. Nor has there been any sustained consideration of the impact of relationship recognition on a diverse population.[16]

Two fundamental difficulties in particular have been generated by expanding concepts of 'spouse' and expanding the use of spousal status to allocate benefits on an across-the-board basis. First, whole classes of people who have either not been permitted by law to marry or who have chosen not to marry are now being deemed to be married. While the extension of new benefits to these classes of people is no doubt welcome, the extension of penalty effects is not. But awareness of the penalty effects is almost nil, and will not likely develop until income tax returns requiring disclosure of cohabitation have to be filed by April 30, 2002. Second, the across-the-board or omnibus strategy of legislating equality has meant that the same benchmarks that are used to identify those qualified to receive government benefits are also used to allocate penalties and thereby to ***disqualify*** people from benefit programs. Neither of these changes were preceded or accompanied by any substantive analysis of the impact of relationship recognition on unmarried couples, nor was either change accompanied by any assessment of whether it is appropriate to continue linking all tax benefits, tax penalties, or government benefits to the same indicators of relationship status. If the attention that continues to revolve around the possible extension of spousal treatment to non-conjugal couples or groups leads to similar legislation, the result will undoubtedly exacerbate the overall penalty effect of relationship recognition and intensify the maldistributional effects of the 'more couples + more joint provisions' approach to relationship policy.

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16 One of the few exceptions have been the reports arising from the review of social assistance carried out in the late 1980s and early 1990s in Ontario. Three documents concluded that automatic spousal status had a disparate negative impact on low-income women, and grappled with various methods of ameliorating that impact. See Social Assistance Review Committee (SARC), *Report of the Social Assistance Review Committee* -- Transitions (Toronto: Ontario Ministry of Community and Social Services, 1988); SARC, First Report of the Advisory Group on New Social Assistance Legislation (Toronto: Queen's Printer for Ontario, 1991); SARC, Time for Action: Towards a New Social Assistance System for Ontario (Toronto: Queen's Printer, 1992).

I. How Tax Benefits and Penalties are Generated

Spousal benefits and penalties can be quite obvious or quite subtle. Benefit provisions tend to be very obvious. For example, the spousal pension allowance extended to all cohabitants under amendments to the *Old Age Security Act* simply expands the class of partners who can claim this allowance between the ages of 60 and 64 to include partners of the same as well as of the opposite sex. There is no immediate downside to that new rule, and the outcome is consistent with what one might expect.

Penalty effects are generally more subtle, and often do not comport with common sense. This is illustrated by the Tax Court of Canada decision in *Poulter* v. *M.N.R.*[17] As soon as unmarried cohabitants were deemed in 1993 to be spouses for tax purposes if they cohabited for twelve months or more with a person of the opposite sex, Ms. Poulter was required to combine her income with that of her male co-resident in order to see if family income fell within the guidelines for the child tax credit. It did not, and she lost that tax benefit.[18] Even though there was uncontroverted evidence that her co-resident did not contribute to her or her child's living expenses, that he played no role in relation to supporting or parenting her child, and that they did not live together with any expectation of combining finances, the court ruled that deeming her to be a 'spouse' for purposes of applying the eligibility criteria did not violate her constitutional equality rights.

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17 [1995] T.C.J. No. 228 (T.C.C.), per Christie T.C.J. (online: QL db TCJ).

18 Between 1992 and 2000, non-married heterosexual cohabitants were deemed to be spouses for purposes of the *Income Tax Act* if they either parented a child or had cohabited for at least twelve months. Section 252(4)(a) was repealed by Bill C-23 and replaced by a provision that removes opposite-sex cohabitants from the definition of 'spouse' and places them together with lesbian and gay couples ('of the same sex') in the new category of 'common-law partner.' Spousal treatment is then applied to couples who are 'spouses' (which is no longer a defined term) and who are 'common-law partners.' The child tax credit eligibility rules were contained in section 122.6 of the ITA; the low-income cutoff (LICO) for 1993 was $25,921.

Rulings like *Poulter* leave low-income people with stark choices: become factually dependent on a co-resident -- even if they have chosen to be financially autonomous -- or give up the relationship.

Poulter is by no means the only case in which a newly-recognized partner has sought to be 'let out' of spousal treatment. As the net of disqualification grows, so too do the numbers and situations in which people feel the need to escape enforced spousal treatment. Clearly this is not an unreasonable response to the many provisions -- low-income cutoffs, the 'tax on marriage', the 'tax on cohabitation', benefit clawbacks, and other benefit-reducing provisions -- that now apply to both married and non-married couples.

There is some indication that the courts may not look very favourably upon such across-the-board definitions of 'spouse' that have the effect of forcing women to chose between financial dependency or loss of an adult relationship. In *Falkiner* v. *Ontario (Ministry of Community and Social Services, Income Maintenance Branch)*,[19] single mothers challenged the constitutional validity of social assistance legislation that, like the child tax credit provisions in the Income Tax Act, deems non-married women to be spouses of male co-residents. The central issue in that case was whether legislation can extend spousal treatment to single individuals even when the parties have no intent to form or function in a marriage-like relationship. This case is being appealed further, but the court definitively concluded that enforced spousal status -- even after three years -- can violate Charter rights when it applies to a group of women 'who wish to share accommodation with a man with whom they may or may not have a relationship, which may be of varying degrees of intimacy.' The court in that case concluded expressly that ascribing

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[19] [2000] O.J. No. 2433 (Ont. S.C.J., Div. Ct.), per Lane and Haley, JJ., Belleghem JJ. dissenting (online: QL db OJ).

spousal status had the effect of forcing women -- especially sole support mothers on social assistance -- to chose between financial independence and remaining in some form of relationship. The court reasoned that forcing such a choice violates human dignity, the right of identity and personhood, the right to choose whether to be a 'spouse,' and the fundamental attribute of autonomy.[20]

The '*Poulter* effect' can be generated either directly or indirectly. Some of the most elusive effects of using the 'couple' as the benefit unit arise from the impact of graduated income tax rates on the value of tax benefits. Canadian income tax rates are 'progressive' in the sense that taxpayers with the lowest incomes pay taxes at the lowest marginal rate, which is 17 per cent, taxpayers with moderate incomes calculate part of their tax liability using the middle marginal rate (26 per cent), and high-income taxpayers calculate their taxes using the top marginal rate of 29 per cent.[21] Whenever tax benefits take the form of deductions, differences in tax rates will mean that the same tax deduction has a different value to different taxpayers.

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20 [2000] O.J. No. 2433 at paras. 108, 109. See also *R.* v. *Rehberg*, [1994] N.S.J. No. 35 (N.S.S.C.) (online: QL db NSJ), per Kelly J., staying a charge against a 39-year-old single mother of six children for fraudulently obtaining social assistance by failing to report that she was cohabiting with a man. The court concluded that the cohabitation rule violated section 15(1) of the Charter, and possibly the section 7 guarantee of security of the person. The same court later ruled that *Rehberg* is not necessarily dispositive of the constitutionality of deemed spouse provisions in other legal contexts, largely because of the uncertain impact of subsequent Supreme Court of Canada decisions and because no section 1 evidence was adduced in *Rehberg*. Thus the issue remains open in Nova Scotia. See *Burroughsford* v. *Lynch*, [1996] N.S.J. No. 334 (N.S.S.C.), per Goodfellow J. (online: QL db NSJ).

21 A 'marginal' tax rate simply means the percentage of tax that is charged on the 'margin' of the taxpayer's income. That 'margin' refers to the last dollar earned. A taxpayer with an income of $10,000 will have a top marginal tax rate of 17 per cent, because the dollar on the margin -- the 10,000th dollar -- falls in the lowest tax bracket. A taxpayer with an income of $70,000 will pay a top marginal rate of 29 per cent because their last dollar earned -- $70,000 -- falls into the top income bracket. However, the higher-income taxpayer will still pay tax of only 17 per cent on the first slice of income.

For example, a low-income taxpayer who pays $3,000 for deductible child care will save $510 on their income tax bill.[22] A taxpayer who pays at the 26 per cent income tax rate would save $780,[23] and the financial value of the same tax deduction to a high-income taxpayer would be $870.[24] The fact that these benefits get larger as income increases is referred to as the 'upside-down' effect. (Many tax deductions were converted to tax credits in 1988 in order to solve the 'upside-down' effect, but that has not completely solved the problem caused by differing levels of income. People who do not earn enough income to use up a tax credit will not receive full or equal benefits. Only fully refundable credits solve that problem.)

The upside-down effect is sometimes used to limit the amount of a tax benefit that can be claimed by a person in a conjugal relationship. This turns the upside-down effect into a subtle mechanism to impose tax penalties on selected couples. Looking again at the child care expense deduction, the *Income Tax Act* requires that the spouse with the lower income claim that deduction.[25] If a woman with a top marginal tax rate of 29 per cent incurs child care expenses of $3,000 is deemed to be co-resident with a person with a marginal rate of 17 per cent, she will be completely prohibited from claiming the deduction, and, although her co-resident would be permitted to claim it, the financial value of the tax benefit would be only $510 instead of the $870 that it would have been for the woman. Especially as magnified by

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22 The amount of tax saved is measured by multiplying the taxpayer's tax rate by the amount of the tax deduction: $3,000 times 17% = $510.

23 $3,000 times 26% = $780.

24 $3,000 times 29% = $870. In reality, each of these figures would be much higher, because provincial income taxes are calculated as a percentage of federal taxes payable. If the provincial income tax rate were 50 per cent of federal taxes payable, a tax benefit worth $510 at the federal level would become worth another $255 at the provincial, and the combined federal and provincial tax benefit would then be $765. When the federal benefit is $780, the combined tax benefit is $1,170; when $870, it is $1,305.

25 ITA section 63.

provincial tax rates, this would mean that spousal treatment would cost the taxpayer some $540 per year in that situation.

II. Significance of the Choice of Tax / Benefits Unit

Continuing with the example of the child care expense deduction, it may appear at first glance that the purpose of the deduction -- to assist parents combining paid work outside the home with parenting responsibilities -- appears to have nothing to do with adult relationships. The fact that a working parent can be penalized in the calculation of the child care expense benefit by reference to his or her relationship with other adults in the household may not attract comment when most taxpayers with children are married, most women are 'secondary' wage-earners, and most partners are men with higher earnings. But as family configurations and family earnings patterns have changed, these differences have become more apparent, and the reason for limiting the deduction to the lower-income spouse (to cut the costs of waged work for 'secondary' workers in a family) begins to look less fair.

Depending on the nature of the relationship between two adults, the new 'spouse' may not in fact contribute to any expenses relating to the child, may not even share household expenses, and may not even share the $510 federal-level tax refund he or she may be able to claim. This might happen if, as with some of the plaintiffs in *Falkiner*, the two adults are not married, or have lived together for only a short period of time, or have agreed not to share incomes or expenses because they both want to maintain their financial autonomy.

On a technical drafting level, access to government benefits and imposition of penalties are both regulated by the choice of the 'unit' used in legal policy. When the married couple is used as

the tax unit or the benefit unit, then no other couples can qualify for benefits or need worry about how living together may affect their eligibility for benefits such as the child credit. When the tax/benefit unit is the individual, then no one has to report their relationship status when accounting for or seeking benefits.

Both of these choices -- use of the individual or the couple as the basic tax/benefit unit -- have significant policy implications. In addition, the way in which the 'couple' is defined is also significant. Older definitions of common-law spouses required that the couple hold themselves out as husband and wife for seven years before they could qualify for survivor pension rights, while Bill C-23 ascribes spousal status for all purposes after twelve months of co-residence (or less, if there is a child).

The demographic characteristics of people affected by tax/benefit unit rules also have policy significance. Not surprisingly, the 'down' side of spousal treatment tends most often to affect members of disadvantaged groups -- female-headed lone parent families, women, who continue to be affected by the persistence of the gendered wage gap, racially-identified individuals and couples, lesbian and gay couples, disadvantaged in terms of incomes by their sexuality, and those affected by disability. All-or-nothing 'taxes on marriage,' 'taxes on cohabitation,' together with the effects of presumptive anti-avoidance provisions, benefit clawbacks, low-income cutoffs, and other mechanisms for severely limiting benefits for single parents and low-income people, disproportionately affect those whose incomes are already depressed because of gender, sex, sexuality, disability, race, or a combination thereof.

III. Plan of this Study

This study addresses the possibility that with increased political awareness of the impact of extended spousal treatment, some of the rules recently amended by Bill C-23 may well be opened up for fresh consideration. To this end, this study addresses quite directly the issue at the core of such a reconsideration, which is whether federal legal policy should continue to use some type of 'couple' or relationship test when allocating benefits and penalties under federal programs, or whether there are some situations in which the individual should be used as the basic unit of legal policy.

Associated with this central question are two further questions: (1) Whether and when non-conjugal couples or even groups of people ought to be considered to form a unit for purposes of benefits or penalties, and (2) How new legal forms such as registered domestic partnerships, civil unions, or reciprocal beneficiary agreements should be treated when partners apply for benefits or seek to avoid penalties on the basis of that union.

The focus of this analysis is primarily on the provisions of federal income taxation. Because the choice of the benefit unit affects direct expenditure programs as well as tax provisions, and because there is increasing cross-over between direct expenditures and tax expenditures, the impact of the choice of the benefit unit in selected direct expenditure programs such as the Canada Pension Plan (CPP), the Old Age Security Act (OASA), and Employment Insurance Act (EI) is also considered.

This study looks first at the evolution of tax/benefit rules in historical, social, and economic context in Canada and five other countries (Sweden, England, Spain, the United States, and

France) which have each developed unique solutions to the problems posed by the choice of the tax/benefit unit. This evolution demonstrates several important points. First, the choice of tax/benefit unit is heavily influenced by family property law, the overall status of women in a society, and the degree of diversity recognized in law. Second, there is a wide range of choices open to policy-makers. Third, the trend in countries that recognize diverse family relationships is to move away from sex-specific and relationship-based provisions and to use the individual as the fundamental unit of legal policy.

Chapter three takes a closer look at some of the sources of non-neutralities flowing from couple-based policies. Drawing on tax policy discourse, economic theory, labour market studies, and comparative microsimulation studies, the connection between gender, marital status, race, sexuality, and use of the couple as the tax/benefit unit is explored. Chapter three also identifies policy criteria against which specific joint provisions -- both joint benefit and joint penalty provisions -- can be evaluated.

Chapters four and five take a closer look at five different types of federal statutes that currently allocate benefits or impose penalties on couples: (1) provisions that extend benefits for supporting economically-dependent adults; (2) provisions that supplement family income -- 'family wage' types of provisions; (3) provisions that affect ownership of family property as between family members; (4) anti-avoidance provisions; and (5) provisions designed to limit access to low-income, child support, and poverty relief measures in various ways. The benefit-conferring provisions are analyzed in chapter four; the penalty provisions are considered in chapter five.

The conclusions drawn in chapters four and five are based on both the purposes of various types of spouse-based provisions and the impact each type of provision has on the distribution

of income. They include recommendations on policy alternatives that would better achieve those purposes and on the scope of application of such alternatives, including the possible extension of some types of provisions to non-conjugal couples.

Income tax policy has been selected as the prism through which to examine the role of the state in regulating adult relationships because income taxation is one of the largest overall instruments of federal fiscal policy. When financial consequences flow from marriage, from supporting an elderly relative, or from living with another adult, the provisions that generate those consequences tend to be scrutinized very closely. However, the patterns revealed in this study are also characteristic of direct expenditures, and thus inform those policy choices as well.

CHAPTER TWO

FAMILY PROPERTY LAW AND TAX UNIT ISSUES

The choice of tax unit in any particular jurisdiction is the product of long-term social and political expectations and beliefs. Two of the most powerful forces that have shaped tax unit choices have been the status of women, especially in relation to property ownership and waged labour, on the one hand, and the overall political context, on the other. This chapter surveys how the tax unit rules in six selected countries have evolved in the face of these factors, and demonstrates that the overall trend is toward use of the individual as the tax and benefit unit.

Sweden, England, Spain, France, and the United States have been selected for this comparison with the development of the Canadian model because they have each followed different paths growing out of the policy framework provided initially by either community of property matrimonial property regimes or common-law regimes. Income tax unit rules in England were initially shaped by common-law matrimonial law, which assigned ownership or management of all family property to the husband. The choice of the income tax unit in Sweden, Spain, and France was shaped by the concept of community of property. Because North American family property law has been affected by both the civil law community property and the common-law traditions, directions taken in relation to the tax unit in those North American countries has been unique as well. What is notable about the evolution of the tax unit rules in each of these countries, however, is that the recognition of women's property and legal rights has had concrete impact on the choice of tax unit.

What emerges from this analysis is the image of a trans-national movement that is still very much in progress. Whether they lived in community property or common-law jurisdictions, by the 1870s women in both Europe and North America had no effective property rights or rights to manage any property that was legally theirs, nor the right to ownership or management of their own earnings. During this stage of development, women were treated very much as extensions of their husbands for income tax purposes. As the women's movement has developed over the last 150 years, producing first matrimonial property laws, then the right to vote, and, finally, gradual legal enfranchisement, there has been a noticeable trend toward greater adoption of individual taxation. Generally, the more women's interests in family property have become individualized and separated from the net matrimonial estate in both common-law and community property jurisdictions, the more the income tax system has moved toward using the individual as the tax unit.

This general trend has not developed smoothly or consistently. Indeed, in several jurisdictions, it has been countered by decisive political action, as in the United States. The rhetoric of family property law and of tax policy discourse has also obscured this trend somewhat. In North America, for example, the movement in family property law in the last century has been away from individual ownership of incomes and property concentrated in the hands of married men by the principles of common-law marital property (the doctrine of coverture) and toward greater 'sharing' by the married couple on 'partnership' principles.[26] At the same time, the rhetoric of 'equity' in taxation and of sharing has made it appear, on a surface level, that treating married couples for income tax purposes as if they do actually 'share' their incomes and property when in reality they do not can undercut women's ***actual*** chances of ownership of family property

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[26] Mary Ann Glendon, *State, Law and Family: Family Law in Transition in the United States and Western Europe* (Amsterdam: North-Holland Publ. Co., 1977) at 126-127.

because it gives married men the tax advantages of sharing even when they do not have to relinquish their interests in fact.

Family property law scholars have noted the growing 'convergence' between community property regimes and common-law property regimes. Community property law is increasingly moving toward deferred community of property, in which married couples own their separate property during marriage but each are deemed to own half of the other's upon divorce or death. In this way, community property law is increasingly functioning in the same way as common-law marital property law. At the same time, common-law jurisdictions are incorporating equitable principles which give married women claims to shares of both income and property owned by their husbands.[27] These equitable claims, which may be based in judicial decisions or in 'equitable distribution' statutes, are not 'gifts' to married women but reflect the allocation of legal title to women on the basis of their ongoing and often in-kind contributions to incomes and/or property owned by married men. In this way, common-law family property law is increasingly functioning like community property law in that it accords married women an interest in the net matrimonial estate calculable on an ongoing basis but distributable only on divorce or death. Overall, this convergence reflects the growing importance of equality between the spouses on a genuine level.

There is another perhaps less visible convergence going on as well -- between family property law and income tax unit rules. As family property become less 'joint' (and held by husbands) and more individuated due to the increased recognition of women's equitable interests, 'ability to

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27 W. Friedmann, 'A Comparative Analysis,' in *Matrimonial Property Law*, ed. W. Friedmann (Toronto: Carswell, 1955) 433 at 451-452, commenting on incorporation of community principles into common-law matrimonial regimes and increasing recognition of individual interests in community regimes.

pay' taxes is increasingly measured by the incomes of individual spouses instead of by 'joint' couple incomes. The individuation of income tax liability -- and of other elements of the tax and transfer system -- is consistent with increased recognition of women's individual property rights even during marriage in both community property and common-law systems. During European deferred community, married women are increasingly treated as owning their separate property. Individual taxation complements and reinforces that ownership. During North American deferred or equitable community, married women are presumed to own their own property. Individual taxation reinforces those interests on an economic level.

This convergence between treating married women as if they own their own incomes and their own property is consistent with treating married women as individuals for income tax and other purposes. Contemporary preoccupation with concepts of 'sharing' in family property law may seem to run counter to this larger trend until it is realized that the purpose of the 'sharing' rhetoric is to justify judicial and legislative recognition of women's property interests.

This chapter presents a brief overview of how family property ownership rules, the emergence of the women's movement, and other structural features have contributed to the present choice of the tax unit in each jurisdiction. The six models surveyed here form a continuum. At one end of the continuum, Sweden uses an almost purely individual model, with few provisions that make any reference to adult relationships in any way at all. At the other end of the continuum, France requires not only married couples but all members of their families to report all household income in one tax return:

Individual models, filing independently:

Sweden:	virtually no relationship-related provisions
England:	many relationship-related provisions
Canada:	extremely large number of relationship-related provisions

Joint models, filing tax returns on one form:

Spain:	optional; full aggregation in some circumstances
U.S.:	mandatory; full income-splitting between spouses optional
France:	mandatory; full income-splitting among all members of family[28]

The general conclusion that is reached in this chapter is that joint models of the tax unit tend to be replaced with individual models as relationships recognized in law become more diverse, as sex roles become more egalitarian, as social values become less 'traditional' and inclusive, as women gain direct legal interests in incomes and assets, and as the state assumes more responsibility for the welfare of children.

I. Individual Models

The first national income tax systems were implemented in the eighteenth century by Sweden and England. Sweden adopted its first comprehensive income tax statute in 1710; England followed in 1799. Both these countries adopted their first income tax statutes long before the mass women's movement had begun. Thus it is not surprising that despite dramatic differences in family property law -- Sweden was a community property jurisdiction, England has been an

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[28] Each of these models has been implemented in clusters of countries. For example, Denmark and Finland also employ the nearly pure individual model of Sweden, while Luxembourg, Portugal, and France all require couples to report incomes jointly.

individual property jurisdiction since the Norman Conquest -- both countries used a pure aggregation version of the income tax unit at the outset. In both countries, married women had few legal or economic rights and were represented in law by their husbands.

In **Sweden**, community of property gave wives an immediate legal interest in husbands' property, but this ownership was more symbolic than real because husbands were charged with administering the community. This administrative responsibility extended to payment of taxes, which were consequently assessed on a household basis. The joint aggregation model in Sweden was eventually replaced in stages by the individual model as women gained access to money incomes and control of their own property. Swedish women were legally emancipated in the Code of 1920, at which time they obtained legal control over their separate property and a 50 per cent share of the 'inchoate community' similar to the present Ontario marital property regime.[29] With the influx of women into waged work during World War II and steep increases in income tax rates, the effect of income aggregation became politicly controversial because it effectively required married women to calculate their tax payable at their husband's top marginal rate.

Although the government did at that time consider moving to individual taxation, it adopted the U.S. model of full income splitting between spouses ('joint filing'), which deems spouses to own all property and incomes in community and attributes half of it to each spouse as if it were their own separate property. This approach was very popular with men, who would be given the tax

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29 Marriage Code of 1920, Act of 11.6.1920, cited in Åke Malmström, 'Matrimonial Property Law in Sweden,' in W. Friedmann, ed., *Matrimonial Property Law* (Toronto: Carswell, 1955) 410 at 411-412; Sprague Barner, *World Tax Series: Taxation in Sweden* (1959); Björne, 'Sweden's Report on the Income, Fortune and Estate Tax Treatment of Household Units,' (1972) 2 Cahier de droit fiscal international 275. Rural women's community interests never exceeded one-third, compared with one-half in urban areas and the rest of Europe.

benefits of sharing their incomes with their wives even though their wives no longer had any legal interest in it. However, it raised a storm of protest among Swedish women, because it meant that women who worked were still subject to higher marginal tax rates than if they were taxed as individuals (the 'stacking effect').[30] When this new scheme came into effect in 1952, an earned income deduction was offered to working women to ameliorate this effect.

These modifications did not completely solve the 'stacking' effect of joint filing, however. Thus Sweden gradually moved to a system of full individual filing over the next two decades. In addition, women now receive generous non-taxable child allowances, additional working wives' deductions to cover the costs of paying for replacements for non-taxed non-waged domestic work, other employment-related expenses, and state-funded child care facilities.[31]

Structurally, Sweden relies very heavily on heavy income taxes for government revenue, and the neutrality of the income tax system toward adult relationships is maintained by delivering childcare benefits directly to families through state-funded childcare.[32] Swedish women have the highest rate of labour force participation anywhere.[33] When Sweden enacted registered

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30 See Sundberg, 'Recent Changes in Swedish Family Law: Experiment Repeated,' (1975) American Journal of Comparative Law 23 at 39. Terminology used in this study is defined in the glossary.

31 Blumberg, 'Comparative Study,' at 85-88. In 1965, women were permitted to elect independent filing; in 1971, separate filing was made mandatory. Investment income is still taxed jointly as an anti-avoidance device.

32 Organization for Economic Development, *Taxation in OECD Countries* (Paris: OECD, 1993).

33 Women's labour force participation rate is 80 per cent; men's is 89 per cent. It is also 80 per cent in China, Niger, and Rwanda. Naomi Neft and Ann D. Levine, *Where Women Stand: An International Report on the Status of Women in 140 Countries*, 1997-1998 (N.Y.: Random House, 1997) at 492-94.

domestic partnerships for cohabitants (heterosexual and lesbian/gay) in the late 1980s,[34] they were also treated as individuals for income tax purposes.

From similar beginnings, the **English** income tax system has moved in a very different direction. It used the husband as the taxpayer from the outset, and the husband treated his wife's income as his own. It was thus subject to the 'stacking' effect of joint taxation as in Sweden.[35] In response to the women's movement in the late 1800s, the *Finance Act* was amended in 1894 to provide a special deduction for wage-earning women.[36] Since 1990, England has used the individual as the tax unit, although a considerable degree of income-splitting has continued to be possible between the spouses. The U.K. just repealed the married man's credit as of April 2000 and will replace it with a child credit in April 2001. Allowances for single parents are becoming means-tested, and child care expenses are not directly deductible, but are an element of the working families tax credit.

Structurally, the U.K. does not rely as heavily on income taxation as other countries, and income tax rates are relatively low. Women's labour force participation is somewhat lower than in Sweden, at 71 per cent (men's is 91 per cent). Cohabitants are not recognized at all.

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34 In 1987, Sweden extended some of the family property rights of married couples to both heterosexual cohabitants and lesbian and gay couples. *Cohabitees (Joint Homes) Act*, SFS 1987:237, amended by SFS 1987:815, cited in Deborah M. Henson, 'A Comparative Analysis of Same-Sex Partnership Protections: Recommendations for American Reform' (1993) 7 International Journal of Law and the Family 282 at 287, 307, note 26, 309, note 28.

35 Under the English common law, the wife's income was the husband's income by virtue of the doctrine of coverture. Marshall and Walsh, 'Marital Status and Variations in Income Tax Burdens,' (1970) 4 *British Tax Rev.* 236.

36 Barr, 'The Taxation of Married Women's Incomes -- Part II,' (1980) 6 British Tax Rev. 478. This tax benefit went directly to husbands, however, and they were under no legal obligation to share it with their wives.

Although the **Canadian** income tax system was modelled almost *verbatim* on the English *Finance Act*, it has used the individual as the tax unit from the outset. However, it has consistently focused special benefits on married couples only, and those benefits have increased in number and value over the last century.[37] These spousal provisions have been used quite blatantly to manipulate women's labour force participation in response to prevailing political attitudes. During the 1920s, when the backlash to the women's movement was gaining momentum, the spousal deduction was limited to situations in which the wife was actually dependent on the husband, and had little income of her own.[38] Labour shortages in World War II resulted in the immediate repeal of the dependency requirements and the income limits on wives, but they were reinstated even more stringently in 1947.[39] Since that time, the dependent spouse credit has remained low.[40] At the same time, income aggregation provisions were indirectly enforced by prohibiting husbands from transferring income-producing interests in family property or businesses to wives, to the extent of refusing to treat salaries earned in family businesses as belonging to women. This in turn made it impossible for women to develop their own CPP and unemployment insurance accounts (UIC).[41]

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37 The *Income War Tax Act* of 1917 gave single taxpayers a personal exemption of $1,500 and a double exemption of $3,000 for married taxpayers. *Income War Tax Act*, R.S.C. 1917, section 5(1).

38 See F. E. Baily, 'Women Bring Too Much Sex into Business', *The Chatelaine* 3:1 (July 1930) at 5 and 41, in which the author argued that 'Some business girls find the cultivation of sex appeal much less trouble than acquiring a deep and wide professional knowledge.' By 1942, a married man would lose the marital exemption for his wife if she earned more than $600.

39 Ruth Pierson, 'Women's Emancipation and the Recruitment of Women into the Labour Force in World War II,' in Susan Mann Trofimenkoff and Alison Prentice, ed., *The Neglected Majority* (Toronto: McClelland and Stewart, 1979) at 125, note 65, citing an administrative memorandum.

40 In 1999, the income-cutoff was still only $572. *Income Tax Act*, R.S.C. 1985, c. 1, s. 118(1)(a).

41 ITA s. 8 (salary paid by sole proprietor husband deemed to be husband's income, not wife's); s. 74(4) (salary paid by husband's partnership to wife deemed to be husband's income to extent of his interest in partnership) (both provisions repealed effective 1980). If a family business was set up as a partnership, the Minister of National Revenue had the discretion to deem the wife's share of partnership profits to be the husband's income unless it could be shown that the wife had actually contributed separate capital or valuable skills to the operation of the business. ITA s. 74(5) (repealed effective 1980). Quebec community property rules were ignored to the extent of treating all income-producing property as belonging to husbands.

Many marriage-related tax deductions and exemptions have now been turned into tax credits, making them less regressive in incidence. Nonetheless, the Canadian individual tax system remains a hybrid because it contains so many joint provisions. Even provisions designed to assist women to enter into waged work are constructed around the joint family income concepts, so that the child care expense deduction and equivalent-to-married credit for single parents is worth more to single parents and can be worth nothing to a deemed spouse. Retaining the individual as the tax unit on paper, the Canadian *Income Tax Act* contains nearly 200 provisions that depend in some way on adult relationships. At the same time, Canadian legal policy has become increasingly egalitarian as it has extended spousal treatment first to cohabiting heterosexual couples and then in 2000 to lesbian and gay couples.[42]

II. Joint Models

Spain and France are both community property jurisdictions that have ended up with some version of joint filing. The United States is predominantly an English-based individual property jurisdiction, but having started out with individual taxation, it moved decisively to a system of joint filing after World War II. The U. S. experience makes it clear that joint filing is symptomatic of a social preference for single-income families.

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[42] These provisions are discussed in detail in chapters four and five.

Spanish law has provided for community property since 1265.[43] Despite the deep entrenchment of community of property laws in Spain, married couples can now elect whether to file jointly or individually, and the rate schedules are calculated to produce more or less the same net tax. There are no tax benefits for single parents, cohabitants are not recognized, and lesbian and gay couples have no legal status. Structurally, Spanish women have a low rate of labour force participation -- 26 per cent (men's is 80 per cent) -- and income taxes take a relatively small share of disposable income even though nearly a third of all government revenues are raised through income taxation. Because the majority of married women are economically dependent on their husbands and the tax differences between filing jointly and filing individually are slight, there is little political pressure to change this system.[44]

The situation is radically different in the **United States**, which began with individual filing and then after World War II adopted a completely unique system of joint filing and income splitting. The emergence of the U.S.-style of joint filing is due very much to the intersection of two political forces: the tension between community property states and common-law property states around income tax policy, and reluctance to recognize women's property rights.

Between 1913 and the 1920s, U. S. income tax legislation looked very similar to the Canadian model. Each taxpayer could claim a personal exemption of $3,000, and married taxpayers could claim an additional $1,000 exemption for their spouse. However, taxpayers in community property states began filing their income tax returns on the basis that each spouse owned half

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43 The Spanish civil code, Las Siete Partidas, arose from the codification of the Roman Justinian Code and Germanic customary law. See *Fuero Juzgo*, Book 4, Title 2, Law 17; compare *Nueva Recopilación*, Book 5, Title 1, Law 4 (1567); *Novi'sima Recopilación*, Book 10, Title 3, Law 4 (1805), cited in William Q. De Funiak and Michael J. Vaughn, *Principles of Community Property* (Tucson, Ariz.: University of Arizona Press, 1971, 2d ed.) at 40.

44 Children's incomes are also aggregated in the Spanish system.

the total family income, thus gaining the tax benefits of full income-splitting. Political tension over this tax advantage built up because people living in common-law states wanted the tax advantages of income-splitting too. In common-law states, the income of each spouse was taxed to the one who earned it.

By 1924, the U.S. income tax system fully reflected the principle that income tax liability should follow legal ownership of incomes and property. This intensified the tension over community property law, because in those states, legal ownership flows from community ownership, and even women being supported by their husbands were considered legally to own half their husband's incomes and income-producing property. As the tax advantages of sharing property ownership with wives in this way became apparent, states all across the country began to adopt community property legislation in order to make these tax benefits available to their residents. The result was the massive transfer of property to women as community property laws began to be adopted in more and more states.[45]

At the end of World War II, during which time women's involvement in war industries work had already raised a great deal of controversy about women's proper roles, the federal government decided to deliver on its promise of a major tax reduction at the end of the war. The tax reduction was directed toward married couples through the stratagem of adopting 'joint filing' rules. This new system deemed all couples in all states -- common-law states as well as community property states -- to own their incomes and property jointly. This extended the tax benefits of community property ownership to all couples at the same time that it made it

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45 The states that actually enacted community property statutes were Oklahoma (1939), Oregon (1943), Hawaii (1945), Michigan (1947), Nebraska (1947), Pennsylvania (1948), and by 1948, strong movements to adopt community property legislation also developed in Massachusetts, Florida, Arkansas, Indiana, Kentucky, New York, and North Dakota. Bills were defeated in Indiana, Massachusetts, Arkansas, and Florida.

unnecessary for states to actually provide for community ownership. Not surprisingly, many of the states that had recently adopted new community statutes immediately repealed them.[46]

The new joint tax unit found its mark very quickly. It accelerated the marriage rate, it contributed to women's withdrawal from waged work, and it provided an excellent reason for most state legislatures to repeal or make optional community property laws adopted only a few years earlier. Married women ended up with new legal and tax liabilities as they became jointly and severally liable for all the taxes on both incomes.

Since the early 1970s, some changes have been made to the provisions of the Internal Revenue Code that affect adult relationships. The so-called 'marriage penalty' that arose from the relative sizes of the income brackets in the joint filing provisions has been reduced, the size of the childcare expense deduction has been increased somewhat, and an earned income tax credit has been adopted to make joint filing more marriage-neutral at low income levels. But the tax benefits allocated to middle- and high-income taxpayers who can afford to live on one income remain firmly in place. Thus women in the U.S. continually weigh the tax effects of waged work against the tax benefits of non-taxed non-waged work in the home. In the meantime, even registered domestic partnership legislation in Hawaii and Vermont civil union legislation has not affected the strict limitation of joint filing benefits to formally married couples.

In **France**, the individual was initially used as the income tax unit, but has been replaced with the most extreme form of joint filing in use anywhere -- the *quotient familial* or 'family quotient'. The family quotient aggregates the incomes of all adults and children in the family, but then

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[46] Ironically, the 'joint filing' system was crafted by Stanley S. Surrey, then Tax Legislative Counsel to the Treasury Department. Surrey is perhaps best remembered in Canada for having exposed in the 1970s how the U.S. tax system was riddled with tax 'benefits' and 'expenditures.' However, he remained a staunch defender of the biggest tax benefit of them all -- joint filing -- to the end.

instead of merely splitting the total between the husband and wife, divides it by a 'quotient' that represents the number of people in the family, including the children. Thus if a husband and wife have two children, the income is divided four ways instead of two ways.[47] This frankly pronatalist mechanism also creates substantial disincentives to women's waged work.

The family quotient developed gradually out of older forms of taxation. The history of French taxation resembled that of Sweden, including the shift from passive community ownership by women to the right to manage their own earnings in the early 1900s[48] through to the aggregation model of taxation.[49] Individual taxation arrived in 1917 in the form of supplementary taxes, but was never used systematically in all tax forms. In 1945, the *quotient familial* was introduced. By the late 1950s, the popularity of joint filing in the U.S. prompted the government to replace all income taxes with the *quotient familial*.[50]

For couples governed by community of property, the consolidation of the income tax system around the *quotient familial* was not so incongruent, since both spouses were deemed to be earning half of each other's incomes and sharing half of theirs at the same time. But for couples governed by separation of property, the *quotient familial* had the opposite effect: women were burdened with tax liability on half their husband's incomes, with no rights to a share of that income to justify the liability or to pay the tax, plus they were burdened with tax liability at the

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47 The first child is weighted at .5 instead of 1, and there is a limit on the amount of tax that can be reduced as the result of the child quotient (in the mid-1990s, it was 31,240FF).

48 In 1932, the French parliament considered adopting deferred community legislation. In the end, it adopted only the legal capacity part of the proposal in 1938, and supplemented those laws in 1952, but never abandoned full community of property as one elective marital property regime. See Marc Ancel, 'Matrimonial Property Law in France,' in W. Friedmann, ed., *Matrimonial Property Law* (Toronto: Carswell, 1955) 3-28 at 26-27.

49 See Ancel, 'Matrimonial Property in France,' at 7; Trotabas and Cotteret, *Droit fiscal* (1975), at 187.

50 *Code General des Impôts*, arts. 193-197 (1959).

highest marginal rate payable by the family unit with regard to half their own wages or incomes from separate property. This divergence in treatment in turn gave French men strong reasons to push for separation of property and absolutely no motivation from a tax perspective to agree to be governed by community of property. Although 'property system shopping' in France is not geographically based as it was in the United States, the inconsistencies between the property-holding system and the income tax system has now created a permanent bias against income and asset sharing between married spouses. This effect was intensified in 1980 when the family quotient was modified to give an additional half part to parents with three or more children.[51]

Women in France have not tolerated this situation quietly. They have protested the imposition of joint liability on women married under separation of property, the husband's management of the joint tax unit, the payment of refunds to husbands, and the extension of valuable tax benefits to men who did not actually engage in the sharing that theoretically justifies the tax benefits conferred on men by the aggregation and splitting of the family quotient system. The women's movement has demanded that an optional separate filing system be available to those spouses governed by separation of property, but that has not happened yet.[52]

Structurally, the French income tax system produces one of the smallest proportions of total tax revenue in any of the European Union countries. Fewer than half of all married women work outside the home, which has blunted political criticism of this system. Whether the enactment of

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51 See Louise Dulude, 'Taxation of Spouses: A Comparison of Canadian, American, British, French and Swedish Law' (1985) 23 Osgoode Hall L. J. at 71.

52 Overall, the family quotient works less of an injustice on French women in the sense that while they bear the tax burdens of community of property, they do receive the property law benefits of community ownership. In the U.S., women bear the tax burdens of deemed community of property, but they receive none of its benefits, remaining in most jurisdictions subject to the common-law pattern of male-centred individual ownership of property.

the PACS for heterosexual and lesbian/gay cohabitants will generate further political pressure to repeal the quotient remains to be seen.

III. Conclusory Observations

The choice of the tax unit in any jurisdiction is ultimately the product of social and political expectations. Many factors shape this choice: the legal and social nature of adult relationships, the economic status of women, the tax structure, and patterns of wage-force participation, family composition, and sex-role expectations.

During the 1900s, changes in family property law played a critical role in shaping the income tax unit. Common-law regimes initially tended to concentrate ownership of incomes and assets in the hands of married men. Joint taxation in such regimes can create incentives to leave property in male hands, because joint taxation enables the owner of incomes and property all the tax benefits of sharing ownership without having to share actual legal title, consumption, or enjoyment of property. This is illustrated by the experience of the U.S. and France. In contrast, using the individual as the tax unit in common-law jurisdictions promotes the transfer of at least some incomes and property to women. This trend can be seen in Canada, although it has been thwarted somewhat by anti-avoidance provisions.

The same conclusions can be drawn in relation to community property jurisdictions. Use of the individual as the tax unit tends to promote community ownership of incomes and property. This in turn tends to support women's access to incomes and property. Paradoxically, joint taxation in community regimes has tended to make individual ownership of property more attractive,

either by creating incentives for higher-income married men to select separation of property (France) or to seek legislative enactment of community property regimes (U.S.).

The challenge for policy-makers over the last half century has been to ensure that tax unit design does not undermine or frustrate the policy objectives of new family property regimes as they emerge. The results vary from country to country, but several trends can be seen internationally.[53] As community property and common-law marital regimes both converge on the principle of equitable sharing of the marital estate, which has increased women's access to incomes and property, there has been a gradual trend away from joint taxation and toward independent taxation of spouses. It is unlikely that this trend would have developed if women had not emerged from the family economy into waged labour and independent ownership of property. The further women have moved into waged work, the more likely it is that the tax unit rules will treat them as independent tax filers and permit them to calculate their tax liability on the same basis as single taxpayers. This trend has rendered tax unit rules and income tax systems as a whole more neutral toward women's waged work. However, political resistance to this trend has, as in the case of the U.S., resulted in backlash use of the income tax unit as a way to block women's access to increased ownership of family property as well as to create incentives to withdraw from waged work.

As some countries have begun to extend spousal treatment to non-married cohabitants, both heterosexual and lesbian and gay couples, further change in the design of the tax/benefit unit can be expected. Sweden, Canada, and France now extend spousal treatment to cohabitants, and Canada has extended spousal treatment to non-conjugal couples in various circumstances

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53 See Appendix C for a table summarizing these features in the six countries surveyed.

as well.[54] The other three jurisdictions remain persistently hostile to such moves. While only two of these three countries rely primarily on individual taxation -- Sweden and Canada -- recognition of diverse relationships appears to prompt further movement toward the use of the individual as the tax/benefit unit.[55] Chapter three explores the main policy considerations that surround this process.

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54 See Appendix A for a tabulation of provisions by categories of relationships recognized.

55 This policy position was adopted in 1989 when Denmark extended spousal treatment to lesbian and gay couples. See Ingrid Lund-Andersen, 'Moving Towards an Individual Principle in Danish Law' (1990) 4 International Journal of Law and the Family 328 at 329. See also Linda Nielsen, 'Denmark: The Family Principle and the Individual Principle' in Andrew Bainham, ed., *The International Survey of Family Law* (The Hague, Neth.: Kluwer, 1997) 127.

CHAPTER THREE

THE CHOICE OF TAX UNIT AND DIVERSITY

The debate over the proper choice of the tax unit has raged for nearly a century in North America. Despite the repeated claim that the issue is actually 'dead,'[56] it has a way of coming back onto the political agenda at regular intervals.[57] In addition, the growing use of 'side door' joint provisions such as transferable credits in the *Income Tax Act*, the GST 'tax on marriage,' and spouse-based limits on access to the employment insurance benefits has meant that the issue is in fact becoming increasingly important even though it is not very visible.

This chapter weighs the tax policy literature on the choice of the tax/benefit unit against the realities of diversity. The purpose of this review is twofold: to trace the policy analysis of the issue in Canada, and to identify the policy criteria and considerations that appear to be relevant to the choice of the individual or the couple generally and in specific policy contexts.

The choice of the tax/transfer unit should be evaluated in the light of standard tax policy criteria -- equity, fairness, efficiency, neutrality, and equality. However, 'equity' and 'fairness' lie in the eye of the beholder in tax policy as well as elsewhere in life. Thus it is not surprising that the perspective most absent from policy analysis of unit issues is that of women. In surveying the

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56 In 1975, the chair of the Australia review committee on taxation recommended that alternatives to the individual tax unit not be pursued in public debate because any form of aggregation is unfair and otherwise unacceptable. See K. W. Asprey, 'Personal Income Tax: The Taxpaying Unit,' in Taxation Review Committee, *Full Report* (Canberra: Australian Government Publ. Service, 1975) at 140-141. In 1988, Jack London declared that the 'marital tax unit...is dead.' Jack R. London, 'The Impact of Changing Perceptions of Social Equity on Tax Policy: The Marital Tax Unit' (1988), 26 Osgoode Hall L.J. 287 at 302.

57 Canada, House of Commons, *Debates* (March 1, 1999), per Manning (Ldr. Opposit., Reform).

arguments in favour of and against continuing to use some form of 'the couple' as the tax or benefit unit, the impact of this choice by gender is explicitly considered.

I. Tax Policy Discourse: Criteria vs. Realities

In his now classic statement of the 'maxims' of good tax policy, Adam Smith wrote in 1775 that taxes should be equitable, simple, convenient, cheap to administer, and difficult to evade.[58] Subsequent restatements of these criteria have never really deviated from this list, although criteria such as 'neutrality,' 'fairness,' and 'equality' have been offered from time to time in order to give policy-makers more concrete guidance as to what is intended.[59]

Despite the centuries-long inclusion of 'equity' in these criteria, however, using the married couple as the tax unit had not been seriously questioned in the dominant discourse until quite recently. It has almost been as if women who have been able to obtain access to this discussion have been speaking in a different language, or were in a different room. For example, when the Royal Commission on Taxation in England concluded in 1920 that the married couple should continue to be used as the income tax unit, the lone woman on the Commission, Dr. Lillian Knowles, Dean of the Faculty of Economics, University of London, wrote a powerful dissent. She contended that it was unfair to treat married couples as a unit because there was no 'common purse,' wives rarely had any control over the family finances, and

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58 Adam Smith, *The Wealth of Nations*, book V, chapter II, part II.

59 See, for example, Canada, *Report of the Royal Commission on Taxation of Income* (Ottawa: Queen's Printer, 1966), vol. 2, at 7-19 ('Carter Commission Report'); J. Sneed, 'The Criteria of Federal Income Tax Policy' (1965) 17 Stanford Law Rev. 567. So attractive are these criteria that they have been absorbed into Charter discourse at the level of the Supreme Court of Canada. See *Edwards Books and Art Ltd.* v. *The Queen*, [1986] 2 S.C.R. 713 at 772, stating that simplicity and administrative convenience are legitimate concerns for legislative drafters.

married women's property legislation required that women be treated as individuals by the state for all policy purposes.[60]

Despite Dr. Knowles' dissent, this point did not surface in any official way in the law reform process in Canada until the mid-1970s. When the Carter Commission drafted its report on the Canadian income tax system in 1967, it concluded that 'equity' in taxation called for both horizontal equity (taxing equal incomes equally) and vertical equity (taxing lower incomes more lightly, higher incomes more heavily), and that income ought to be measured by 'ability to pay' as measured by access to consumption, not by legal ownership of individual incomes.[61]

When applying these criteria to the question of the tax unit, the Commission concluded that Canada should follow the French *familial quotient* and treat the entire family as the tax unit. The Carter Commission therefore recommended that all family incomes should be aggregated and taxed at special rates that reflect the number of dependents in the family. The Commission further suggested that all investment income be aggregated in the same way, making it unnecessary to track transfers of property between spouses to ensure that they were not designed to avoid taxes. The Commission did recommend that single mothers be given special tax credits, but it was convinced that when applying equity criteria to the married couple, the most important comparison was between couples with the same total income rather than between the individual spouses.

Treating all couples as being able to chose whether one or both spouses would work for wages, the Commission viewed the two-income couple as essentially receiving the benefit of income-

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60 Dr. Lillian Knowles, 'Reservation,' in *Report of the Royal Commission on Taxation* (London: Queen's Stationer, 1920) 151.

61 Carter Commission, *Report*, vol. 3.

splitting that was denied to single-income couples.[62] The Commission also expressed the beliefs that U.S. income-splitting would lure families to leave Canada and that 'the married couple itself adopts the economic concept of the family as the income unit from the outset,'[63] unfairly gives two-income couples more discretionary income when compared with single taxpayers, promotes income splitting, necessitates anti-avoidance legislation, and discourages spouses from transferring investment property to each other.[64]

Even at the time the Carter Commission *Report* was released, this view of the married couple was more in the nature of wishful thinking than based on economic realities. During the 1960s, Canadian women had already begun to enter waged work in unprecedented numbers. By 1966, 35.4 per cent of all Canadian women had joined the labour force, and women accounted for some 31 per cent of all employed adults at that time. This was an accelerating trend. By 1976, women's labour participation rate had already reached 45 per cent.[65]

These realities had little impact on policy analysis of the tax unit. Leading tax scholars had quickly fallen in behind Stanley Surrey's defense of joint filing by 1960,[66] and with the Carter Commission *Report* advocating essentially the same income-splitting mechanism as that enacted in the U.S., support for joint filing snowballed in Canada and elsewhere.[67]

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62 Carter Commission, *Report*, vol. 3, para. 282.

63 *Report*, vol. 3, at 123.

64 Carter Commission, *Report*, introduction.

65 Pat Armstrong and Hugh Armstrong, *A Working Majority: What Women Have to Do For Pay* (Ottawa: Canadian Advisory Council on the Status of Women, 1983) table 1 (it is now 58 per cent).

66 Stanley S. Surrey, ' Federal Taxation of the Family -- The Revenue Act of 1948' (1948) 61 Harvard Law Rev. 1097; Oliver Oldman and Ralph Temple, 'Comparative Analysis of the Taxation of Married Persons' (1960) 12 Stanford Law Rev. 585.

67 See, eg., Boris I. Bittker, 'Federal Income Tax and the Family' (1975) 27 Stanford Law Rev. 1309; Michael J. McIntyre and Oliver Oldman, 'Taxation of the Family in a Comprehensive and Simplified Income Tax' (1977) 90 Harvard Law Rev. 1573.

In retrospect, it is amazing that the Canadian government did not end up adopting some form of joint tax unit as the result of these recommendations. Despite receiving submissions like those made by Dr. Knowles half a century earlier in the U.K., the Royal Commission on the Status of Women in Canada recommended in 1970 that couples should be allowed to elect to be taxed jointly.[68] Shortly thereafter, the Law Reform Commission of Canada commissioned a study by Jack London, who also endorsed the Carter Commission family unit proposal.[69] Credit for rejecting joint filing can be given to the government of the day, which concluded that joint taxation would be unfair to second income-earners, largely women.[70]

However, the government did give joint taxation serious consideration in the mid-1970s when an interdepartmental committee on the taxation of women split over the issue. National Revenue supported joint taxation on grounds of fairness and simplification; Status of Women Canada adamantly opposed it on equity grounds.[71] The government actually appeared to be embarking on the process of implementing joint filing in the early 1980s when it took the first step suggested by the Royal Commission on the Status of Women -- abolishing the spousal

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68 Canada, *Report of the Royal Commission on the Status of Women* (Ottawa: Queen's Printer, 1970), at 303-304 ('Status of Women, Report'). The first stage of this process was to be the repeal of the spousal deduction. The Commission had also considered -- and rejected -- the recommendation that women's non-waged work be treated as their imputed incomes in order to counter the bias in favour of single-income couples. See Douglas Hartle, 'Taxation of the Incomes of Married Women,' *Studies of the Royal Commission on the Status of Women in Canada* (Ottawa: no. 5, 1971); Status of Women, Report at 295-296, 298.

69 Jack London, *Tax and the Family* (Ottawa: Law Reform Commission of Canada, 1975). London was also concerned with the tax exemption of women's non-waged work in the home, but he recommended that women should receive a money salary for that work which would then be included in the tax base of the family unit. Interestingly, London later recanted this position and supported individual taxation of married women on the basis that the majority of women had joined the waged labour force. See London's comments in Louise Dulude *et al.*, 'Taxation of the Family: A Panel Discussion' (1979) Canadian Taxation 16, and London, 'Changing Perceptions.'

70 E. J. Benson, Minister of Finance, *Proposals for Tax Reform* (Ottawa: Queen's Printer, 1969).

71 Canada, 'Report of the Interdepartmental Committee on the Taxation of Women' and Julie Loranger, memorandum to the Hon. Marc Lalonde, Minister responsible for the status of women, cited in Louise Dulude, 'Taxation of the Spouses' (1985) 23 Osgoode Hall L.J. 67 at 84.

exemption. When The Hon. Judy Erola, Minister Responsible for the Status of Women, made this proposal, however, many Canadian women reacted angrily at what was perceived as an attack on the value of women's non-waged work. Abstract discussions of neutrality, equity, and fairness went out the window as the issue became politically explosive.[72]

Since that time, there has been an uneasy truce around the tax unit issue. Academics have increasingly supported retaining the individual as the tax unit and limiting or even abolishing the growing numbers of 'side-door' joint provisions.[73] Some policy analysts have advocated moving to the individual as the benefit unit to complement the individual tax unit,[74] but even the Working Group on the Taxation of Women, established in the early 1990s by the Fair Tax Commission of the NDP government of Ontario and consisting almost completely of women, divided over the 1970 recommendation of the Royal Commission on the Status of Women that the spousal credit by repealed.[75]

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72 See 'Cut back spousal tax break Erola says' *The Globe and Mail* (6 January 1983) 1; 'Erola's proposal to curb spouse tie called thoughtless,' *The Globe and Mail* (11 January 1983) 6.

73 See for example, Kathleen A. Lahey, 'The Tax Unit in Income Tax Theory' in E. Diane Pask et al., *Women, the Law, and the Economy* (Toronto: Butterworths, 1985) 277; Maureen Maloney, 'The Tax Implications of Marriage, Motherhood, and Divorce' (1988) 3 Canadian Journal of Women and the Law 1; Kathleen Lahey, *The Taxation of Women in Canada* (Kingston: Queen's Univ., 1988).

74 Social Assistance Review Committee (SARC), *Report -- Transitions* (Toronto: Ontario Min. Comm. Soc. Servs., 1988); SARC Benefit Structure Project Team, 'Benefit Unit' *Social Assistance Legislation Research and Technical Background Documents* (Toronto: SARC, 1991).

75 Fair Tax Commission, *Report* (Toronto: FTC, 1993) 266. Cf. Canadian Advisory Council on the Status of Women, *Tax Facts: What Every Woman Should Know* (Ottawa: CACSW, 1993).

II. Pros and Cons of Joint and Individual Taxation

The oldest European income tax systems automatically used the married couple as the tax unit because taxation was essentially treated as an extension of family property law. Those income tax systems that adopted the individual as the taxation unit from the beginning -- in North America, Australia, and New Zealand -- were formulated after the married women's property movement was well under way. Whether articulated or not, the first justification for individual taxation of married couples was recognition of women's separate legal personality.

In support of joint taxation: The clearest justification for joint taxation has emerged from the United States as the result of the intense political debate surrounding the shift from individual to joint taxation under the Surrey Plan in 1948. At that time, the justification was very simple: Posed as a matter of horizontal equity ***between couples*** with equal incomes, the proposition was that couples with the same incomes ought to bear the same total tax load. Couples living on one income were equated with couples with two incomes, and the argument was essentially that a wife's decision to work outside the home is, in effect, a form of income splitting. Joint taxation was thus conceived as a sort of anti-avoidance measure designed to ensure that even if husbands' earnings were 'split' with their wives by having the wife earn part of the total family income, the couple together would bear the same total tax whether earned by one spouse or both.

The contention that equity calls for equal taxation of couples with equal incomes has been buttressed with additional arguments since then. Adherents of joint taxation have contended that joint taxation is an effective anti-avoidance device because it reduces the incentive to transfer property to the lower-income spouse in order to avoid income taxation; that it reflects

the pooling and sharing of resources inherent in the marital bond; and that it is consistent with the formation and functioning of the couple as an economic unit. It has been described as being 'neutral' toward marriage, simplifying the tax system, and reducing compliance and administrative costs because couples have to file only one tax return.[76] To the extent that it is apparent that joint taxation does benefit higher-income spouses at the expense of lower-income spouses (see below), the argument is made that this is a 'trickle-down' effect that benefits the couple as a unit, with part of the benefit flowing from the state to the couple in the form of tax subsidies from income-splitting.[77] The argument has also been made that the sharing inherent in conjugal relationships means that legal title to income is not the most important consideration in allocating tax liability, and that couples should measure their 'ability to pay' by reference to each other's incomes or lack of incomes rather than by legal income.[78]

In support of individual taxation: The most obvious argument is that joint taxation violates principles of formal equality and personal autonomy.[79] Another obvious argument is that it subjects income of a second spouse to a higher marginal rate of taxation than would otherwise be borne if the spouses were treated as individuals. This is because when spouses are taxed as individuals, each of them essentially starts with a tax rate of zero on the first $6,000 of income because of personal credits, and then pays tax at the rate of 17 per cent on the next

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76 For an illustrative if uncritical presentation of these arguments, see F. Barry Gorman, *Canadian Income Taxation: Policy and Practice* (Toronto: Carswell, 1999) at 169-170.

77 The argument that persuaded the Supreme Court of Canada to approve the income-splitting effect of deductible child support payments can be classified as a 'trickle-down' argument.

78 Amy C. Christian, 'Joint Versus Separate Filing: Joint Return Tax Rates and Federal Complicity in Directing Economic Resources from Women to Men' (1997) 6 Review of Law and Women Studies 443 at 449.

79 Note however that the only authorities in support of that position to date are the *Falkiner* and *Rehberg* cases discussed in chapter one. *Contra Thibaudeau* v. *Canada* [1995] 2 S.C.R. 627, in which the Supreme Court of Canada concluded that the inclusion of child support payments in a divorced woman's income did not violate the equality guarantees of the Charter because the inclusion-deduction system benefits the entire 'post-divorce unit.'

$30,000 of income, 26 per cent on the second $30,000, and 29 per cent on anything over approximately $60,000.[80] Aggregation of spousal incomes means that combined incomes will move through progressive rates faster, taxing the second income at a higher marginal tax rate when aggregated than when taxed individually. Even if some method of income splitting is used, as in the U.S., loss of the tax benefits of income splitting as the second spouse enters the waged labour market acts in reverse to increase the top marginal tax rate on the second income faster than if it had not been split in the first place.

This 'stacking effect' of joint taxation is criticized because it violates the principle of vertical equity. Two frames of reference can be used to analyze the equity impact of joint taxation:

> ***inside the couple:*** by comparing the total tax borne by each spouse when assessed jointly *versus* individually, it can be seen that joint taxation increases the total tax on the second income-earner;
>
> ***outside the couple:*** comparing married individuals taxed jointly *versus* single individuals, it can be seen that joint taxation increases the over-taxation of a couple's second income.

Whichever frame of reference is used, it can be seen that any second income will be over-taxed relative to the first. This over-taxation is the mirror image of the under-taxation of the first income. The over-taxation of a second income creates an effective transfer of after-tax income to the first income-earner, creating a subsidy from one spouse to the other. Because this 'subsidy' will always run from the lower-income spouse to the higher-income spouse, it clearly violates the principle of vertical equity, which posits that taxpayers with higher incomes should bear higher taxes.

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80 These figures are all approximate Canadian federal rates only.

At least a dozen other arguments in favour of individual taxation flow from this vertical equity analysis:

(1) Over-taxation of the second income-earner acts as a disincentive to waged labour.

(2) This disincentive is gendered because women's incomes are generally lower than men's and therefore represent less of a loss to the couple.

(3) Thus joint taxation benefits high-income single-income couples.

(4) Joint taxation reflects outmoded images of the family and of adult relationships.

(5) Policing joint taxation would involve unwarranted intrusions into the privacy of intimate relationships.

(6) Marriage is no longer a distinctive form of adult relationship, but has a great deal more in common with post-divorce, single-parent, cohabitant, and non-conjugal relationships than in the past. Thus basing the tax unit on marriage is not clearly rational.

(7) Tax liability should be based on legal ownership of incomes and property, not on a theoretical 'couple' unit, because ownership confers control and thus ability to pay.[81]

(8) Basing tax liability on legal ownership creates incentives for spouses to genuinely share their incomes and property with each other by transferring legal title.

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[81] Louise Dulude, 'Joint Taxation of Spouses -- A Feminist View' (1979) 1 Canadian Taxation at 8.

(9) Presumptive sharing of incomes and property without requiring tax liability to follow legal title actually creates a disincentive to actual legal sharing.

(10) Spouses have no legal way to enforce sharing during marriage, nor to enforce sharing of tax benefits received by one at the expense of the other.

(11) Over-taxation of second incomes tends to intensify women's economic dependence on their partners.

(12) Sharing consumption varies so much from couple to couple that it is not a valid justification for ongoing violations of vertical equity within the couple; in addition, sharing consumption is not limited only to married couples.

(13) Single-income couples generally derive valuable tax-exempt benefits from non-waged domestic work, which actually increases the effective economic power of those couples when compared with two-income couples.

On a mathematical level, the greater the difference between two incomes, the more severe each of these effects will be. The only time joint taxation will not produce these negative effects is when two partners have exactly the same incomes. In such a situation, of course, their tax liability is minimized completely, at which point joint taxation would factually have no impact on their tax liability.

III. One and Two-Income Couples: 'Apples and Oranges'

The main argument generally made in favour of joint taxation is that couples with 'equal incomes' should pay 'equal taxes.' Because two-income couples will always pay lower taxes

than single-income couples under graduated rate structures, the conclusion is that using the individual as the tax unit violates horizontal equity because it does not 'tax likes alike'.

Table 3-1 demonstrates how this argument is usually presented. The tax paid by the single-income couple -- the Apples -- is $24,906. This is much higher than the $18,363 paid by the two-earner Oranges, even though they have the same total income of $80,000. This difference between the Apples' tax when compared with the Oranges' tax is due to the difference in tax rates that apply when the Oranges' incomes are taxed on an individual basis.

Although the size of the personal credits claimable by both couples is roughly the same (the Apples can claim one personal credit plus one spousal credit, the Oranges can claim two personal credits and no spousal credit), each of the Oranges receives the full tax benefit of the lowest income tax rate. In contrast, the second $40,000 earned by the Apples is 'stacked' on top of the first $40,000 because the whole $80,000 is treated as belonging to the spouse who earned it. This stacking effect drives the calculation of total tax payable into the second and third income brackets, each of which bear significantly higher tax rates for 1999.

This type of calculation is typically used by those who advocate joint taxation. It is designed to demonstrate that individual taxation violates the principle of horizontal equity when women have their own incomes. The conclusion suggested by the analysis in table 3-1 is that the income tax system does not generate 'equal taxes for equal-income married couples.'[82]

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82 Some analysts simply end their consideration of the issue here. See, for example, Anne L. Alstott, 'Tax Policy and Feminism: Competing Goals and Institutional Choices' (1996) 96 Columbia Law Review 2001 at 2032.

Table 3-1: Tax reduction from spousal salary splitting, 1999

	The Apples		The Oranges	
	Spouse 1	**Spouse 2**	**Spouse 1**	**Spouse 2**
Income	$80,000	–	$40,000	$40,000
Tax paid*	$24,906	–	$9,181	$9,181
Average tax rate	31%	0%	23%	23%
Marginal tax rate	49%	0%	36%	36%
Total tax paid by couple	**$24,906**		**$18,363**	
Average tax rate**	31%		23%	
Marginal tax rate+	49%		36%	
$ saving			$6,543	
% saving++			**26%**	

Sources: Income Tax Act, R.S.C. 1985, c. 1, as amended for 1999 taxation year.

* Federal and provincial rate combined (Ontario).

** Tax payable expressed as a percentage of income.

\+ In progressive rate structures, the rate payable on the last dollar of income received.

++ Amount of tax saved expressed as a percentage of the tax paid by spouse 1 as sole worker.

This analysis is in fact highly unrealistic. The couples in table 3-1 are called 'The Apples' and 'The Oranges' in order to emphasize that functionally, they are not actually at all 'alike.' The assumptions in table 3-1 presume that these two couples can each decide how each spouse will go about earning the income they want or need, and that they can decide in one year that one of them will earn their entire income, another year that they will each earn half the total income they want, and in a third year they can chose to earn in some other proportion.

These assumptions are in fact not just unrealistic, but are almost impossible to attain in reality. First, it may well be that neither of the Oranges has the education, experience, opportunity, or ability to earn $80,000, so that the comparison drawn in table 3-1 is purely theoretical. Second,

the Oranges have to work more hours between them to earn their $80,000, because it is extremely unrealistic to assume that either of them can earn $40,000 from part-time work. Third, the Apples can expect that spouse 2 will perform at least some non-waged domestic work that will contribute to the net well-being of the couple. The value of this work is of course not taxed. Fourth, Apple spouse 2 might not realistically be able to earn $40,000 even if the Apples wanted to 'split' their earnings in the same way as the Oranges. Fifth, Apple spouse 1 may not want to impair his or her 'human capital' by cutting back to part-time work in order to 'split' income.[83]

In gendered societies, all these points of difference will almost always intrude into abstract theory. As figure 1 demonstrates for the Canadian context, this is because women's average incomes remain markedly low when compared with men's. The income gap in figure 1 remains well over 50 per cent throughout most women's lives. Thus if a 35-year-old man and a 35-year-old woman were to become spouses, for example, the woman's income would be, on average, only 33 per cent of total couple income. The 50-50 split upon which the main proof of the equity of joint taxation is premised is so unrealistic that it is actually or practically not relevant to the issue.[84]

Table 3-2 carries out the same horizontal equity analysis using more realistic average incomes for each spouse in a notional two-income couple ($18,500 for the average female, $37,000 for the average male). When these actual average incomes are attributed to the Oranges, the two-

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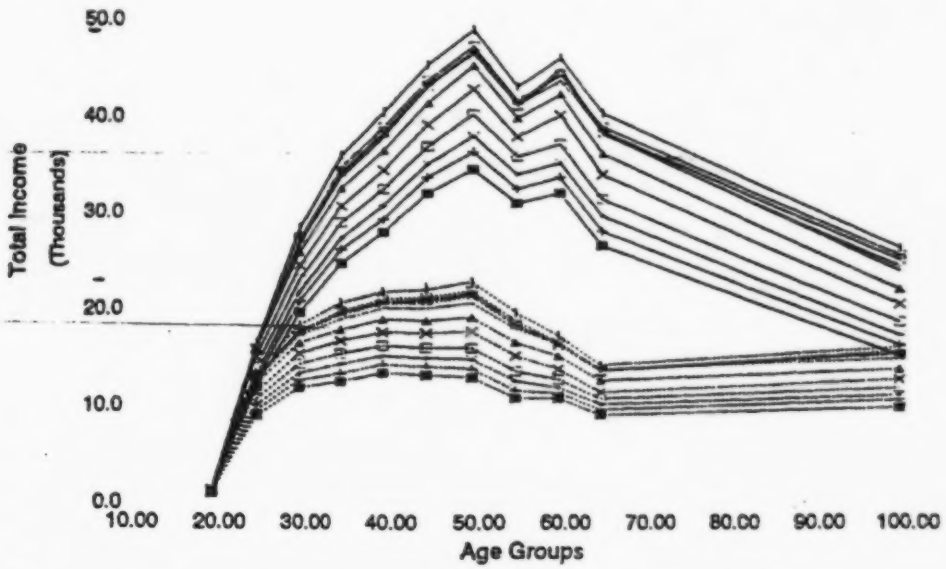
83 Many of these points were first made by Pamela Gann, 'Abandoning Marital Status as a Factor in Allocating Income Tax Burdens' (1980) 59 Texas Law Review 1 at 31.

84 Most 'wage gap' statistics are based on full-time full-year employment, and thus generate very different average incomes for women and men.

income couple, it can be seen that the overall 'tax benefit' of joint taxation of the income-splitting type *versus* being taxed on an individual basis is much smaller -- it is a mere 8.5 per cent.

Figure 1: Total incomes by age and sex, 1984-1995



Source: Statistics Canada, SPSD/M version 5.2, adjusted to years 1985-1995.

This reduction is much smaller than was calculated in figure 3-1 because the degree of so-called income splitting itself is much smaller. To the extent that spouse 2 already has income of $18,500, it can be seen that only $9,250 of spouse 1's income can be notionally shifted to spouse 2 in order to optimize the tax effect of income splitting. Whether such a shift would notionally 'neutralize' any differences in total tax payable as between couples with equal or unequal incomes is not nearly so compelling as the fact that the shift would actually increase spouse 2's taxable income and thus tax payable without actually increasing spouse 2's income. More importantly, shifting $9,250 of spouse 1's income to spouse 2 means that spouse 2's income tax bill is $2,200 higher -- but spouse 2 still has the same actual amount of income. At the same time, spouse 1 still has income of $37,000, but achieves a tax saving of that $2,200.

This shift violates vertical equity because the low-income spouse bears the cost of giving the higher-income spouse a substantial tax subsidy.

Table 3-2: Joint *versus* individual taxation of two-income couple, 1999

	Taxed as individuals		**Taxed Jointly**	
	Spouse 1	**Spouse 2**	**Spouse 1**	**Spouse 2**
Income	$37,000	$18,500	$27,750	$27,750
Tax paid*	$8,092	$2,770	$4,970	$4,970
Average tax rate	22%	15%	18%	18%
Marginal tax rate	36%	24%	24%	24%
Total tax paid by couple	**$10,862**		**$9,940**	
Average tax rate of couple	19.6%		17.9%	
Marginal tax rates of couple	24, 36%		24%	
$ saving			$923	
% saving**			**8.5%**	

Sources: Income Tax Act, as amended for 1999 taxation year.

* Federal and provincial rate combined (Ontario).

** Amount of tax saved expressed as a percentage of the tax paid by the husband as sole income-earner.

This supposed violation of vertical equity will always exist whether the relative or total incomes are higher or lower. Note that when $9,250 of spouse 1's income is notionally shifted to spouse 2, spouse 2 will leave the lowest tax bracket $9,250 faster than otherwise, thus reaching a higher marginal tax rate much more quickly. This imposes an extra cost on spouse 2's extra income. This 'stacking effect' will occur whether spouse 2 has income of nil to begin with or has income nearly equal to that of spouse 1.

The other factor that is not reflected in the standard analysis of the tax burdens borne by one-income *versus* two-income couples is the untaxed value of any non-waged domestic work that may be performed by either or both spouses under the two sets of assumptions. Unpaid household work is gendered. Non-waged married mothers spend nearly double the daily average time in unpaid work -- 7.5 hours per day, seven days per week -- and employed women spent an average of 3.2 hours per day on unpaid work as compared with 1.8 hours for employed men.[85] Even if this non-waged work is valued at a mere $4 per hour, this means that a single-income couple will produce around $13,578 in untaxed household work per year ($10,950 by the non-waged spouse, $2,628 by the income-earning spouse) -- substantially greater value than the $8,223 produced by an employed couple ($4,672 by an employed woman, $2,628 by an employed man). When these admittedly conservative figures are added into the analysis in table 3-2 above, the balance in net economic power shifts considerably, because the $13,578 in unpaid household work significantly outweighs the $923 'tax advantage' enjoyed by the two-income couple (the Oranges).

Under conditions of progressive taxation and given the deeply-entrenched differences in male and female income-earning abilities and patterns of unpaid household work, several conclusions can be drawn about the impact of joint *versus* individual taxation:

(1) Joint taxation reduces the tax load on all couples who earn unequal amounts of incomes.

(2) The largest benefits of joint taxation go to single-income couples.

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85 Judith Frederick, *As Time Goes By...Time Use of Canadians* (Ottawa: Statistics Canada, catalogue no. 89-544E), based on the 1992 General Social Survey.

(3) Only couples who can afford to live on one income will receive the full tax benefit of joint taxation.

(4) The higher the supporting spouse's income, the larger the tax benefit of using the couple as the tax unit.

(5) The tax benefits of joint taxation disappear as the income of the supporting spouse falls.

(6) Low-income couples do not benefit from joint taxation because their tax burden will largely be eliminated by the existing credit structure.

(7) Two-income couples will not receive the full tax benefit of joint taxation because the higher income will not be fully split.

(8) Joint taxation reduces the tax load on additional income earned by the high-income spouse and increases it on additional income earned by the lower income spouse when compared with individual taxation.

(9) Above low-income levels, the current Canadian tax system operates like a relatively pure individual model.

(10) Tax-exempt non-waged domestic work becomes more valuable as household incomes rise, yet full-time employees have less time to perform such work.

The implications of these conclusions for women are gendered. Because women in Canada continue to receive markedly lower incomes than men regardless of whether they are single, married, or cohabiting, using the couple as the tax unit would increase women's average and marginal tax rates. At the same time, joint taxation would reduce their spouse's average and marginal tax rates. Even women who support their partners would not realize the same tax

benefits from joint taxation of couples, because women's incomes are almost invariably much lower than men's.

Overall, using the couple as the tax unit would increase the rate of income taxation on women in adult relationships and reduce the after-tax income realized by women entering waged work. As Patricia Apps has concluded, a preference for the effects of this model across the income range is a 'preference for inequality' in adult relationships.[86] This inequality has behaviourial implications for women as a class, as well as for all people whose incomes are depressed by characteristics such as race, disability, or sexuality.

IV. Behavioural Effects of Joint Taxation

Five behaviourial effects flow from joint tax instruments. These behaviourial effects are particularly disadvantageous for women: (1) the over-taxation of second incomes (this effect is generated by all types of joint fiscal instruments); (2) the tax exemption of non-waged domestic work; (3) the high costs of entering waged work; (4) the 'substitution effect,' whereby women on the economic margins are vulnerable to substituting untaxed non-waged work for waged work when the above factors render the net financial gain from wages too low; and (5) the disincentive to sharing of incomes and property within the family. Arguments in favour of joint policies based on beliefs about marital sharing, 'economies of scale,' and income pooling are also behaviourially-based.

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[86] Patricia Apps, 'Tax Reform, Ideology and Gender' (1999) 21 Sydney Law Review 437.

Over-taxation of second incomes: As early as 1970 in Canada, it was recognized that all forms of joint taxation that extend tax benefits to single-income couples impose tax penalties on women with incomes.[87] Whether provisions are expressly limited to single-income couples or not is not nearly so important in producing this effect as are the relative levels of incomes received by partners. The smaller the second income, the greater the over-taxation that flows from spouse-based benefits.[88] Joint benefit provisions have similar effects (discussed in chapter four).

Tax exemption of non-waged work: Estimates of the amount or value of women's non-waged work vary considerably, but there is little doubt that continuing to exempt this form of production from the tax base creates a persistent and substantial pressure on women to contribute to the family economy in this way.[89] Especially when second incomes bear heavier tax loads than first incomes because of the impact of spouse-based provisions, the non-taxation of non-waged domestic production creates a bias against women's waged work.[90] As income tax rates increase, women devote more time to home production and men less because the 'tax saving'

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87 Status of Women, *Report*, at 291.

88 At the present time, these effects flow primarily from ITA s. 118(1)(a) (spousal credit), s. 118.8 (other credits transferable from one spouse to another); and s. 146(5.1) (deductions for contributions to spouse's RRSP). Proposals for modifying these rules are considered in chapter four.

89 Studies consistently confirm that over half of all housework is performed by the wife only, even when both spouses work for wages. See Statistics Canada, "Employed parents and the division of housework" by Kathleen Marshall in (1993) 5:3 *Perspectives on Labour and Income* 23. 1996 census data indicate that 23 to 25 per cent of all wives spend more than 30 hours per week on unpaid housework, childcare, or care to elders, compared with less than 10 per cent of all husbands. Over 76 per cent of those performing between 30 and 60 hours of unpaid housework were women. Statistics Canada, *Sex and Census Family Status*, 1996 (catalogue no. 93F0027XDB96014).

90 Women are socially set up for this work in the first place, and market-based wage differentials turn this social assignment into a 'rational' economic choice. See Nancy Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (1978) at 30-39.

from non-waged work increases as taxes increase.[91] Although loss of self-services increases the cost to women of entering waged work, women who work part-time and full-time still work the 'double day.'[92] Women's quality of life thus suffers as exhaustion, stress, and frustration at being unable to perform optimally in either area of life take their toll, and this effect in turn is exacerbated by women's low earnings.[93]

The costs of waged work: Behaviourially, it might appear that the costs of entering waged work are somewhat within the control of the individual. But for women, these costs involve not only the loss of self-services but also the necessity of laying out part of their earnings for child-care and elder-care, for these are two forms of unpaid work that cannot simply be abandoned. In addition, it is actually very difficult for women to avoid incurring at least some additional costs for non-deductible transportation, work-related supplies and equipment, and personal care items. In total, these expenses can account for as much as 18 to 30 per cent of a couple's after-tax income,[94] much of which is often thought of as due to the woman's decision to enter waged work.[95] The deductibility of some of a couple's child care expenses does alleviate this burden to a certain extent, but as state support for child care expenses diminishes, so does women's labour force participation.[96] When the total costs of waged labour are taken into consideration, it can often happen that the small benefit from 'splitting' income by having two

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91 Jane H. Leuthold, 'Home Production and the Tax System' (1983) 3 Journal of Economic Psychology 145.

92 Ruth Roach Pierson and Marjorie Griffin Cohen, *Canadian Women's Issues: Bold Visions* (Toronto: James Lorimer, 1995) vol. II, at 11-15.

93 McIntyre and Oldman, 'Taxation of the Family,' at 1609, argue to the contrary, reasoning that performing non-waged work is a personal choice driven by a variety of unpredictable factors.

94 S. A. Rea, 'Taxes, Transfers, and the Family' (1984) 34 Univ. Toronto L.J. 314 at 324.

95 Status of Women, *Report*, at 291 raised this concern in 1970.

96 Increased child care costs particularly have a direct impact on the decision to enter waged labour. See Rachel Connelly, 'The Effect of Child Care Costs on Married Women's Labor Force Participation' (1992) Review of Economics and Statistics 83.

income-earners is offset, leaving two-income couples with lower net after-tax incomes than single-income couples.

Labour force participation rates: All these behaviourial effects add up. Economists have concluded that women's labour force participation rates are measurably affected not only by the level of child care available to them, but by the impact of taxation on their marginal rates of tax, after-tax and after-expense incomes, the weight of non-waged work and its relative value to the couple overall, and joint taxation elements. Joint taxation in particular is an important factor, because it simultaneously increases the marginal tax rates of no- and low-income spouses and reduces the marginal tax rates of the higher-income spouse. When compared with individual taxation, joint taxation thus violates the principle of vertical equity at the same time that it intensifies gender inequities because it disparately impacts on women's labour force participation rates generally and creates a bias against women's entry into waged work in comparison with men.[97] Because women's labour supply has been found to be more 'elastic' (sensitive to incentives and disincentives) than men's, women are considered to be more likely to substitute unpaid work for waged labour when faced with higher rates of income taxation on their earnings. The 'stacking effect' of joint taxation triggers just that response.

The welfare 'wall': These behaviourial effects are exacerbated when the couple is used as the basic unit for welfare benefits as well as for income taxation. The combined effect of these two

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97 See, for example, Michael J. Boskin and E. Sheshinski, 'Optimal Tax Treatment of the Family: Married Couples' (1983) 20 Journal of Public Economics 281; Jane H. Leuthold, 'Work Incentives and the Two-earner Deduction' (1985) 13 Public Finance Quarterly 63; Norma Briggs, 'Individual Income Taxation and Social Benefits in Sweden, the United Kingdom, and the U.S.A. -- A Study of Their Inter-Relationships and Their Effects on Lower-Income Couples and Single Heads of Household' (1985) International Bureau of Fiscal Documentation 243; Patricia Apps, 'Tax Reform, Ideology and Gender' (1999) 21 Sydney Law Rev. 437 at 448. The foundational work in this area is Patricia Apps, A Theory of Inequality and Taxation (Cambridge: Cambridge University Press, 1981).

types of joint fiscal provisions produce super-barriers to the labour force participation of women who receive social assistance. When women lose their welfare benefits due to their spouse's earnings, the only way the loss can be compensated is to seek waged work. Joint taxation will then increase the combined tax rate to as much as 75 to 86 per cent at the lowest income levels.[98] This rate drops as employment earnings reach the $15,000 level, but the regressivity of the income tax rate structure is not completely phased out until somewhat higher incomes are reached.[99] Sometimes referred to as the 'poverty gap,' this 'welfare wall' exists whenever incomes or earnings are used to phase out direct social benefits.[100]

Disincentives to sharing: The experience with joint filing in the U.S. has demonstrated that when tax liability follows legal ownership of incomes and property, individual taxation of people in relationships promotes economic sharing. The opposite is also true: Joint taxation promotes economic individualism. This seemingly paradoxical effect arises because joint taxation presumes people to share ownership when they do not, and thus bases tax liability on a presumption instead of on reality. Giving people who do not share incomes or property the tax benefit of presumed sharing thus eliminates any incentive they might otherwise have to actually share. Especially because family property law in Canada has increasingly come to recognize women's equitable ownership of family property, the tax system should permit those equities to define income tax liability. Equity in incomes and property is best supported by policies that are designed around the standard of vertical equity among individuals. When policies are designed

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98 Ken Battle and Sherri Torjman, *The Welfare Wall: The Interaction of the Welfare and Tax Systems* (Ottawa: Caledon Institute of Social Policy) at 11.

99 Kathleen A. Lahey, *The Taxation of Women in Canada* (Kingston, Ont.: Queen's Univ. Faculty of Law, 1988) figure 7-2 at 342.

100 Organization for Economic Co-Operation and Development, *The OECD Jobs Study: Evidence and Explanations (Part II)* (Paris: OECD, 1994) 265, documents the causes of the 'poverty trap' for selected OECD countries. See also Andrew Mitchell, 'Impact of STEP changes on marginal tax rates' (unpublished; manuscript on file with author), detailing marginal tax rates of up to 100 per cent under the new Ontario social assistance rules.

to promote horizontal equity between couples without regard to the individual roles of those partners, joint taxation discourages pooling, sharing, or other forms of partnership behaviour.[101]

V. Diversity and the Tax / Benefit Unit

Tax policy analysts have been extremely slow to consider how factors such as race, ethnic origin, Aboriginal identity, disability, and sexuality affect tax policy choices. These characteristics are important because they have a clear impact on economic status and relationship status, both of which are factors that affect the distribution of after-tax incomes and economic behaviour.

Race and ethnic origin: Adult incomes in Canada care are affected not only by gender, but also by race and ethnic origin. Members of racially-identified groups generally face lower incomes than other people in Canada. This means that the average incomes of visible minority group women are usually markedly lower than average incomes of all women in Canada. It also means that men's incomes are usually negatively affected by race as well. (See Appendix D) Thus racially-identified couples will at least be markedly poorer than non-racially-identified couples, and they may also have more nearly equal incomes than do heterosexual couples generally.

These generalizations should be treated with caution, however. While male incomes in some groups are extremely low when compared with national averages or average non-visible minority incomes, women's incomes are not necessarily much lower. This is because some

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101 The leading work on this issue is Jan Pahl, *Money and Marriage* (London: MacMillan, 1989).

forms of race-based discrimination -- such as discrimination against people classified as Black -- have historically affected men in that group to such an extent that their incomes more nearly resemble those of the women in that group. For example, in 1996, Black men's average incomes were $23,320, as compared with $43,162 for non-visible minority men generally and as compared with $31,917 for visible minority men as a class. With nearly the very lowest male incomes in the country (along with Filipino and Korean men), Black men found that they earned only slightly more than Black women, whose average incomes were $18,610. Black women are also income-disadvantaged, but Black women's average incomes are closer to the average for all visible minority women, which was $20,162 (but compare that average with non-visible minority female income of $29,074).[102]

Aboriginal peoples are also severely affected by poverty, but the gap between women's and men's incomes is similar to that affecting average women in Canada. In 1995, the average income for all non-reserve Aboriginal people was $17,382.[103] Aboriginal women's incomes are markedly lower than those of men, whether they live on a reserve or not, and whether they are status 'Indian,' Inuit, or Métis.[104]

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102 The tendency for Black women to have relatively high women's incomes and for Black men to have some of the lowest men's incomes appears to be a long-standing feature of the U.S. Black economy. See James A. Sweet, 'The Employment of Wives and the Inequality of Family Income' in Alice H. Amsden, ed., *The Economics of Women and Work* (Markham, Ont.: Penguin Books, 1980) 400. Sweet discusses data from 1960 on Black women's and men's incomes. Divergences between race-based groups are significant. For example, in 1996, the average Japanese man earned almost the same income as non-minority men ($42,277), while Japanese women, who earned among the highest minority women's incomes, still earned substantially less than average non-minority women ($22,804), demonstrating the combined effects of race and gender.

103 Statistics Canada, *The Daily* (Ottawa: Statistics Canada, 1998).

104 Because only status 'Indian' people living on reserves are exempt from taxation, this means that non-reserve people, including Inuit, Métis, non-status First Nations, and off-reserve status 'Indian' people are all subject to income taxation, and have to be considered when assessing the impact of the design of the tax/benefit unit on racially- and ethnically-identified groups.

These kinds of income patterns have two significant implications for the design of the tax/benefit unit. First, whenever incomes are reduced because of race discrimination, women in adult couples will have far less 'choice' as to whether to work full-time, couples together will have far less 'choice' over what percentage of overall family income either of them will earn, and partners will be under pressure to optimize incomes on an ongoing basis. Second, whenever neither spouse can earn enough to support the entire household, the supposed tax benefits of 'income splitting' that flow from joint tax measures can never be claimed because both partners will in fact have to work for wages. Many racially-identified women have higher labour force participation rates not because they may have a higher preference for waged work, but because they have no other viable source of support.[105]

Tax benefits aimed at single-income couples or that are most valuable to couples with large differences in individual incomes will completely bypass racially-identified taxpayers. To the extent that significant government assistance is allocated to couples with high-low income patterns, single incomes, or low labour-elasticities, racially-identified taxpayers will be denied meaningful access to them.[106] This effect flows from the fact that couples belonging to visible minority groups function economically very much like individuals from a tax and benefit point of view no matter what their legal status. There may be substantial sharing of incomes and property, but complete economic dependency is simply not an option for many couples.

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105 U.S. data for 1990: European American women had a participation rate of 56.4 per cent; African American women had a rate of 59.5 per cent; Chinese American, 59.2 per cent, Filipina American, 72.3 per cent. Women from other racial-ethnic groups had only slightly lower participation rates than European American women, although Island Puerto Rican women's rate was the lowest at 37.2 per cent. Teresa Amott and Julie Matthaei, *Race, Gender, and Work: A Multi-cultural Economic History of Women in the United States*, rev. ed. (Boston: South End Press, 1996) Appendix C at 412.

106 See, eg., Beverly I. Moran and William Whitford, 'A Black Critique of the Internal Revenue Code' [1996] Wisconsin Law Rev. 751; Dorothy A. Brown, 'Race, Class, and Gender Essentialism in Tax Literature: The Joint return' (1997) Washington and Lee Law Rev. 1419.

Other effects are associated with labour participation rates, the loss of tax-exempt imputed incomes, and the costs of entering waged work. With depressed male incomes in visible minority groups, male incomes will not be so income-inelastic as those of men who can optimize their incomes through prolonged labour force attachment. Thus lack of access to income tax or direct benefits increases the risk for both women and men that economic pressures to take on increased amounts of non-waged work will intensify the 'double day' effect and place greater pressures on the household to absorb the effects of less genuine leisure.

Sexuality: The few income studies of lesbian and gay couples that exist suggest that as individuals and as couples, people characterized by sexuality or by sexuality combined with gender face lower incomes. One of the largest studies, which used census data on same-sex unrelated couples, found that within the categories of coupled individuals, 'household incomes were highest for married couples and male same-sex couples, followed by unmarried different-sex couples, and lowest for female same-sex couples.'[107] Within those aggregate findings, the effects of sexuality and gender on income can be seen: lesbian women's incomes are only 86.9 per cent of the lowest men's incomes (cohabiting men), and 85.7 per cent of gay men's. No such studies have been carried out in Canada to date, but microsimulation studies suggest that similar findings would not be unexpected.[108]

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107 Marieka M. Klawitter and Victor Flatt, Antidiscrimination Policies and Earnings for Same-Sex Couples (Seattle, WA: University of Washington Graduate School of Public Affairs, 1995) (Working Papers in Public Policy Analysis and Management) at 20, discussing data in their Tables 3 and 4. See Appendix E for a summary of this data.

108 See Kathleen A. Lahey, *The Impact of Relationship Recognition on Lesbian Women in Canada: Still Separate and Only Somewhat 'Equivalent'* (Ottawa: Status of Women Canada, publication pending). See also Gay and Lesbian Equality Network and NEXUS Research Cooperative, *Poverty: Lesbians and Gay Men: The Economic and Social Effects of Discrimination* (Dublin: Combat Poverty Agency, 1995) at 27, reporting that 21 per cent of lesbian women and gay men in Ireland live in poverty.

These income patterns suggest that the impact of joint versus individual taxation on lesbian and gay couples will be quite different than for women or men in heterosexual relationships. First, there are likely to be fewer lesbian women and gay men who are economically dependent on their partners. Thus the full benefits of income splitting under joint taxation will be available to fewer lesbian and gay couples. Second, the differences between the incomes of the two lesbian women or gay men in a given couple are likely to be less marked than between male-female pairs in married couples. To a lesser extent, this is also true of cohabiting heterosexual couples: income differences between the women and men in those couples is also less pronounced than between women and men in married couples. The smaller the gap between the higher and lower incomes in two-income couples, the smaller the tax benefits of joint filing, the smaller the disincentive effects on labour force participation, and the smaller the implicit tax penalties on the lower-income spouse who increases their income. This means that lesbian and gay couples -- and to a certain extent, perhaps cohabiting heterosexual couples -- may be less affected by the vertical inequities generated by joint taxation.

On the other hand, shifting from individual to joint taxation of adult couples would have disparate negative impact on lesbian and gay couples. As women, lesbian women will be least able to take full advantage of the tax benefits conferred by joint taxation. This is because at low female incomes, it is less likely that there will be many single-income lesbian couples. Thus the largest tax benefits of joint taxation would be unavailable to lesbian couples.[109] It is also possible that gay men have a lower preference for single-income couples. In addition, the strong incentive effects of joint taxation could induce lesbian and gay couples to behave more like heterosexual couples in terms of income differentials, allocations of non-waged work, and other features considered to be economically counter-productive. For an economy that has not yet eradicated

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[109] This hypothesis is supported by the findings of Lahey, *supra*.

or even significantly minimized the historical effects of women's economic disadvantage, the introduction of new policy structures that are known to intensify dependency behaviour through hidden barriers to wage force participation and labour supply effects would be unsound. For racially-identified lesbian women and gay men, these effects may well be even more pronounced.

Cohabitants: Family forms themselves inject an additional element of diversity to this analysis. Single parent families, second, third, and even fourth families, blended families, couples with and without children, multi-generational families, co-resident cohabitants, and separated cohabitation are all increasingly respected as valid relational choices. There has not as yet been any large-scale study of the implications for unmarried cohabitants of being deemed to be married in Canadian law, but as has been demonstrated in the *Falkiner* case, not all cohabitants value the chance to pool resources or to become economically interdependent as much as they value their economic autonomy and self-dependence. As has been observed of Swedish fiscal policy, the government has concluded that legislation should support the rights of 'any adult individual [to] take responsibility for him/herself without being economically dependant on those closely related.'[110]

VI. Structural Implications of Diversity

The main problem with joint taxation is that it contributes to the overall regressivity of the tax system. Regressive taxation takes proportionately more taxes from low-income people and redistributes the revenue to people with middle and high incomes. Because joint taxation of

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110 Nielsen, 'Family and Individual Principles,' at 140.

adult couples takes after-tax income from the partner with the lower income and transfers it to the higher-income partner, joint taxation contributes to the overall regressivity of the tax/transfer system. The same dynamic applies to transfer payments such as social assistance. This regressivity runs directly counter to the main direction of policy development in Canada over the last thirty years, which has focused on promoting self-dependence among women disadvantaged by sex and marital status and therefore supporting egalitarian relationships: joint taxation confers no benefits on those in egalitarian relationships, and confers the largest benefits on those in relationships of economic dependency.

The regressivity of joint taxation is intensified in diverse societies because people disadvantaged by race, sexuality, and/or ability tend to have relatively low incomes. Their partners are also more likely to have relatively low incomes. The tax benefits of joint taxation are largest for single-income couples and smallest for dual-income couples with similar incomes. Thus people whose incomes are negatively affected by discrimination will always receive fewer benefits from joint taxation.

When the effects of joint taxation on couples characterized by race, sexuality, and/or disability are taken into consideration, it can be seen that while joint taxation creates significant pressures on heterosexual non-raced women to withdraw from waged work, the benefits of joint taxation largely bypass those who cannot make that choice. This is because heterosexual non-raced women have access to support from the group with the highest average income -- non-raced married men -- while those characterized by race, sexuality, or disability face measurably lower incomes throughout their lives and thus are less likely to be able to live on a single income. Men disadvantaged by race will be less likely to receive average male incomes; thus whether heterosexual or gay, racially-identified men will receive smaller tax benefits from joint taxation. Lesbian women's incomes are depressed by virtue of gender, and, as well, lesbian couples

have no access to higher men's incomes. Thus lesbian couples are likely to receive very small benefits or even no benefits from joint taxation. Joint taxation creates tax incentives for adult couples to substitute non-waged labour for income-earning work; thus joint taxation would increase incentives for women and men in functionally egalitarian relationships to seek smaller incomes at the same time that they are largely excluded from this benefit.

Putting the effects of joint taxation on women as a class together with its effects on all people disadvantaged by race, disability, and/or sexuality leads to the conclusion that as adult relationships become more diverse, the adult couple however defined should not be used as the tax/benefit unit. The married couple has not been the dominant model of adult relationships for some time now, and as households have become more diverse, the goal of neutrality between conjugal couples -- 'equal taxes for equal-income couples' -- becomes increasingly difficult to attain via joint taxation in any event. In addition, the boundaries and characteristics of all relationships have become less unique over the last two decades. This means that increasingly informal relationships can be identified only through increasingly intrusive means.[111]

Two main structural solutions have been proposed to deal with the overall regressivity of the tax/transfer system and the cumulative effects of long-term use of joint taxation. One solution is to replace joint tax measures with individual measures. The other is to reduce the overall regressivity of the taxation system by reducing tax rates for low-income people and increasing them for people with higher incomes. Recent comparative studies have found that neutrality between individuals without regard to their marital status, living, sharing, or consumption arrangements -- individual taxation -- is to be preferred because it promotes vertical equity,

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[111] Lawrence Zelenak, 'Marriage and the Income Tax' (1994) 67 Southern California Law Rev. 339 at 381.

counters the regressive impact of the total tax system, and has a positive effect on the incentive to work for both spouses -- not just on the lower-income spouse.[112]

In diverse societies, these two recommendations have to be implemented carefully, because race, gender, disability, and/or sexuality will affect the impact of each of these solutions.

Eliminating regressivity: The Canadian tax system as a whole is sharply regressive at the lowest income levels. On grounds of fairness alone, and particularly because individuals affected by gender, race, sexuality, and disability tend to have low incomes, lowering the bottom tax rates and increasing personal exemptions would reduce regressivity. In addition, the 'welfare wall' caused by the abrupt loss of social assistance payments coupled with regressive bottom income tax rates should be dismantled, and the tax and transfer systems should be integrated with each other.[113]

The weight of economic opinion suggests that the substitution effect caused by gender differences in income elasticities can best be countered by reducing the tax load on the lowest incomes and increasing tax rates on higher incomes.[114] This recommendation arises out of the fact that as women move from non-taxed unpaid work into waged work, lowering the tax load on waged work will reduce barriers to waged labour. However, merely lowering the bottom tax

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112 A recent study of 15 European countries concluded that adapting joint taxation models for the U.K. context would render the tax system more regressive in impact and would have a negative effect on the incentive to work for both spouses -- not just the lower-income spouse. Cathal O'Donoghue and Holly Sutherland, 'Accounting for the family in European income tax systems' (1999) 23 Cambridge Journal of Economics 565 at 589-591.

113 This was the recommendation of the Ontario Social Assistance Review Committee in its *Transitions* report.

114 For example, consider Mary L. Heen, 'Welfare Reform, Child Care Costs, and Taxes: Delivery Increased Work-Related Child Care Benefits to Low-Income Families' (1995) 13 Yale Law and Policy Review 173.

rates would not have much impact on labour participation rates of women who because of the low individual income associated with race, disability, or sexuality are already engaged in waged labour and have little choice but to continue to work for wages. Lowering taxes on low incomes would increase their after-tax incomes and thereby increase well-being, but should be augmented with sex-specific cost-reduction measures (such as deductions for child care) to increase the profitability of waged work, or by direct public funding of child care services.

Race tax critics have pointed out two structural problems that each of these general solutions will pose for racially-identified women and men. The first problem is that if the profitability of moving into waged work is increased for women whose partners can actually afford to support them, competition for employment on the margins will increase for women who have no genuine choice but to work for wages.[115] The second problem is that if the tax rate on high incomes is increased, this increase would disparately disadvantage members of the very groups who are under-represented at higher income levels.

On balance, reducing the regressivity of tax/transfer provisions at low-income levels would be consistent with the principles of vertical equity, equality, and fairness. However, this solution would still compound the employment and income problems of racially-disadvantaged people if the reduction of taxes and work-related costs were not accompanied by measures to redress employment discrimination.

Eliminate joint tax/transfer provisions: Joint tax provisions take many different forms. Joint filing and income splitting as in the U.S. and France are by no means the only types of joint tax or transfer measures that regressively tax two-income couples. Eliminating joint tax provisions

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115 Brown, 'Race Essentialism.'

that primarily benefit single-income couples should be accompanied by eliminating joint features attached to other measures such as child care deductions. Repealing joint tax measures that are not available to racially-identified women, gay men, disabled people, or lesbian women will not directly benefit them, but eliminating income-targeting joint measures such as the requirement that the spouse with the lower income claim child care expenses will be of benefit to people in two-income couples.[116] Repeal of such joint measures will not assist those with low or nearly equal incomes. Nor will it offset the continuing benefit of exempting single-income couples from taxation on the value of non-waged domestic services. In order to redress that violation of vertical equity, policies designed to deliver similar services to two-income couples with low incomes on a tax exempt basis will be needed.

No one structural modification can eliminate the many inequities and non-neutralities that pervade the tax and transfer systems surrounding adult relationships in Canada today. Specific policy alternatives that can achieve the two main goals of eliminating regressivity and replacing joint measures with individual measures are considered in chapters four and five. Chapter four examines alternatives to joint 'benefit' provisions. Chapter five examines alternatives to join 'penalty' provisions.

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116 See Brown, 'Race Essentialism,' at 1508-1511, for a discussion of how many 'feminist' solutions to gender inequities would either have no impact on racially-identified people or would even intensify their poverty.

CHAPTER FOUR

JOINT BENEFIT PROVISIONS

The regressive effects of joint taxation can be produced in many different ways. When couples are permitted to aggregate and split their incomes, as in the U.S., or when this splitting is permitted on a family basis, as in France, joint taxation will affect the whole of the incomes so aggregated. If only a couple's investment income is aggregated and split, as in Sweden, then earned incomes will not be affected by joint provisions, but property income will be. More limited forms of joint taxation can be found in provisions like the dependent spouse credit in Canada, which is available only when a spouse has no appreciable income of his or her own, in the tax exemption of employee fringe benefits for which spouses can qualify, in survivor benefits under tax-deferred retirement funding plans, or in provisions that suspend tax liability flowing from transfers of property from one spouse to another. Benefits paid to economically-dependent partners under social security and income assistance programs may have this effect, although the deferred-income features of many of these programs take them out of the category of government benefits and turn them into a type of private property.

In the aggregate, these joint measures confer substantial tax benefits on couples who are treated as spouses. The total costs of these benefits can be substantial. Depending on income levels and economic behaviour, some couples can achieve nearly complete income splitting with these provisions, and even those couples who cannot completely 'split' their incomes with these tax credits and deductions can achieve at least some degree of splitting. While joint

taxation is not as severe a problem as it is in France or the U.S., Canada continues to rely heavily on joint provisions in comparison with other countries.[117]

These joint provisions operate in several distinct ways: (1) Income-splitting provisions reinforce the 'substitution effect,' creating tax incentives for second income-earners to leave paid labour in response to relative over-taxation and thereby become economically dependent. (2) The tax exemption of unpaid labour performed by a partner makes unpaid work more 'profitable' than paid labour when the other partner can support the household. (3) The tax exemption of many employee fringe benefits contributes to the substitution effect by increasing consumption without increasing tax liability (the 'family wage' effect). (4) Exempting inter-family transfers of income and property from taxation tends to promote economic dependency.

The trend toward cohabitation instead of marriage and the increased recognition of lesbian and gay relationships suggest that formal marriage is not the central relationship form it once was. However, these two trends have actually made spousal provisions in federal law more important than ever before. With this unparalleled expansion of spousal treatment (but not, it is important to note, of spousal status), all the tax and transfer provisions that produce these effects now apply to a larger number of adults than ever before in Canada's history. However, many of the adults who now receive spousal treatment are, in economic terms, functionally more self-dependant than married couples. The extension of spousal treatment to lesbian and gay couples in particular raises questions as to whether this is a healthy direction for federal benefits policies to pursue in the face of these demographics.

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[117] See Maureen Baker, *Canadian Family Policies: Cross-National Comparisons* (Toronto: University of Toronto Press, 1995), chapter four for a comparison with Australia, France, Germany, the Netherlands, Sweden, the United States, and the United Kingdom.

This chapter analyzes three different types of joint benefits delivered by the tax and transfer systems in Canada: provisions that provide government subsidies for single-income couples; provisions that function like the old 'family wage' system by supplementing couple incomes in ways that are designed to exclude single individuals; and provisions that affect family sharing of incomes and property. The questions addressed in relation to each of these three forms of joint benefits relate to the stated purposes of each type of provision, the scope of each provision (*i.e.*, which family members receive these benefits?), the distributional impact of these provisions, and the best alternatives for reform (if any).

I. Benefits for Adult Dependency

The federal and provincial governments in Canada give many different direct and tax-based benefits to adult couples. Qualification for these benefits varies from program to program. The provisions examined in this section are distinguished from the whole range of spouse-based provisions by one characteristic: they can be claimed only by a partner who can be considered to be supporting an economically-dependent adult. These are not benefits for the support of dependent children, although some 'dependent' children may in fact be adults. Instead, they are tax and direct benefits that are focused exclusively on couples living on one income. All these tax and direct benefits are available to formally-married spouses and to opposite-sex cohabitants who meet the relevant statutory definitions of 'spouse,'[118] and are also available to cohabiting lesbian and gay couples as of 2001 as the result of Bill C-23.[119]

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118 Until 2001, 'spouse' is defined in *Income Tax Act*, s. 252(4) except for cohabitants who elect to be reassessed as if Bill C-23 applied to the 1998, 1999, and 2000 taxation years; the same is true of the definitions in *Old Age Security Act*, R.S.C. 1985, c. O-9, s. 2, and *Canada Pension Plan Act*, R.S.C. 1985, c. C-8, s. 2. After Bill C-23 comes fully into effect, only married couples will be considered to be spouses, and cohabitants (lesbian, gay, and heterosexual) will be classified as

None of these provisions is expressly labelled 'for dependent spouses only.' Nonetheless, they are structured in a way that ensures only single-income couples can in fact claim them.[120] The married credit cannot be claimed by supporting taxpayers unless their partners have no more than some $500 in income in any given year. Thus any taxpayer who claims this credit will in fact have to be supporting the other spouse. Transferable credits can be claimed on an elective basis when the other spouse's income is so low that he/she cannot make use of them. This makes them less restrictive, but in effect, they are transferable only when the couple has one income or falls into the high-quite low pattern.[121] Alimony is paid only when there is a sufficient income disparity between the payer and recipient to convince a court that the claimant was in fact so economically dependent on the payer during marriage that this condition will continue for at least several years after the relationship ends. The tax benefit flows to the payer,[122] the theory being that this benefit will be shared with the former partner, but the amount of the payment will be cut down in the recipient's hands by his or her own income tax liability. In practice, this 'trickle down' tax benefit rarely reaches the recipient.

'common-law partners' but will be given spousal treatment throughout the *Income Tax Act* and most other federal statutes.

119 For this list of provisions, see Appendix F. Under the terms of federal-provincial tax collection agreements, it would appear that lesbian and gay couples will be given spousal treatment wherever the federal *Income Tax Act* is incorporated into provincial law by reference. Thus the failure to amend the Ontario *Income Tax Act* in Bill 5 (extending spousal treatment to 'same-sex partners' for most purposes of Ontario law) will not prevent lesbian and gay couples in Ontario from receiving spousal treatment at the provincial level of income taxation as well as at the federal level. The same result is achieved in Quebec through a different route. Provinces that have announced they will withdraw from the tax collection agreement -- such as Alberta -- will continue to exclude lesbian and gay couples from spousal provisions of provincial income tax law but Albertan lesbian and gay couples will receive spousal treatment for federal purposes. The status of Alberta heterosexual cohabitants is in the process of being changed at the moment.

120 ITA, s. 118(1)B(a). For 1993, the federal component of this credit was $915. When the provincial income tax rate is 50 per cent of the federal tax payable, the value of the married tax credit at the provincial level is $457.50. The higher the provincial tax rate, the larger the provincial version of this credit will be.

121 See ITA section 118.8, transferring unused credits for age ($592, subject to low income cutoffs section 118(2)), mental / physical impairment ($720; section 118.3(1)), education expenses (section 118.6), tuition (section 118.5), and pension income ($170; section 118(3)).

122 ITA, ss. 60, 60.1.

Two of the most important direct benefits for dependent spouses are the federal spousal pension allowance (SPA) and the Canada Pension Plan (CPP) survivor pensions and death benefits. The SPA, which is a form of age-based welfare, has stringent income-cutoff limitations that define eligibility for the dependent spouse's pension allowance. To qualify, an opposite-sex spouse or cohabitant must be between the ages of 60 and 65, and depending on the status of the other spouse, their combined incomes must fall between $22,608 and $29,376 ($16,584 for widowed spouse). The maximum monthly SPA benefit is $752.44 ($830.70 for widowed spouse).[123] The maximum CPP survivor pension is $457.75 per month.[124] CPP survivor pensions are paid without regard to the amount of the survivor's income. A surviving spouse will only be deemed to be dependent, however, if he/she is 65 years of age or older or he/she is less than 65 years old but is disabled, has dependent children, or is over the age of 35.[125] CPP credits can also be shared with a spouse, which enables spouses to openly split this form of retirement income.

In the aggregate, these tax and direct benefits to adults with dependent spouses account for substantial government expenditures. In 2000, the transferable credits will probably cost about $354 million; the alimony deduction, $167 million; CPP survivor pension payments, $250 million; the SPA, $498.2 million; and the married credit, over $2.5 billion.

Not all of these benefits function in the same way. The married credit and transferable credits function very differently from the alimony deduction, OAS spousal pension allowance, and CPP

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123 These are the levels for the third quarter of 2000. All income cutoffs and benefit amounts are adjusted quarterly to reflect increases in the cost of living as measured by the Consumer Price Index.

124 For calendar year 2000. The precise level of benefit payable depends on the age of the survivor and the number of dependent children. A death benefit may also be payable. Department of Finance, *The Canada Pension Plan: Basic Facts* (Online: CPP Publications, 2000).

125 *Canada Pension Plan Act*, ss. 44(1)(d), 58(2).

survivor and splitting benefits. The married and transferable credits are available to single-income couples of any age, any income level, and any condition of health or incapacity. The alimony deduction arises in the particular circumstances of economic need after divorce, while the other two pensions address poverty or being widowed/raising children alone. However, all of these provisions create partial joint tax units whenever they are available.

Married and transferable credits: The forerunner to the married credit was the married exemption, which was enacted as part of the first Canadian income tax statute. The initial purpose of the married exemption was to leave married men with larger after-tax incomes than single men, married women, and 'spinsters.' At the time, the hope was expressed that all married men would 'do their duty,' but it was frankly recognized that not all who would qualify for the exemption would necessarily have or support children. At the same time, the fact that single people or married women might also have support obligations was trivialized.[126]

The original married exemption did not contain any express requirement that one spouse be economically dependent on the other. In the backlash against the early women's movement in the 1920s, however, the exemption was gradually amended in order to limit claims to husbands with economically dependent wives. In 1925, the exemption was limited to situations in which the dependent spouse's income was less than $1500.[127] During the depression, when resentment at two-income couples intensified even further, this income cap was progressively reduced. By 1942, it was a mere $660. However, the onset of World War II prompted the federal government to repeal the income cap and dependency requirements entirely: '[T]here was a great uproar in the country about the folly of a tax scheme which would make it desirable

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126 Canada, House of Commons, Debates and Proceedings, 7th Sess., 12th Parl., IV: August 3, 1917, at 4103, Mr. Verville; 4104, Mr. Graham; 4105, Mr. Knowles.

127 House of Commons, *Debates*, vol. 4, 1st Sess., 15th Parl., 16-17 George V, 1926, at 3772.

for married women to leave industry and the government service when we needed the services of everyone.'[128]

The married exemption was amended instrumentally once again at the end of the war. The dependency requirement was reinstated in 1947, this time with the lowest income cap ever -- $250. Although the government openly admitted that the dependency requirement had been suspended as a 'temporary measure to encourage married women to enter war work during the acute period of labour shortage,' it steadfastly denied that the new rules were designed to force women out of waged work. The policy rationale given was that the new income cap would place married couples 'on a more equitable basis in relation to other taxpayers.'[129] Business owners were less coy about the purpose of the $250 cap, complaining that married women were quitting their jobs once they had earned $250 for the year.[130]

Pressure to adopt the U.S. joint filing (income splitting) system steadily mounted throughout the 1950s and 1960s. Despite the Carter Commission recommendation that the French family quotient system be adopted, the government maintained the marital exemption, and merely adjusted the income cutoff in order to smooth out the second income-earner's transition from dependent to taxable status.[131] In response to continued pressure for enhanced benefits to married couples, however, in the mid-1970s, the federal government gradually introduced a variety of transferable tax benefits that, depending on the makeup of a married couple's income, made it functionally possible for them to achieve a considerable degree of income splitting.

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128 *Debates*, vol. V, July 17, 1942, at 4337.

129 House of Commons, *Debates*, vol. 4, 2nd Sess., 12th Parl., 10 George VI, 1946, at 3815.

130 See Ruth Pierson, 'Women's Emancipation and the Recruitment of Women into the Labour Force in World War II,' in *The Neglected Majority*, ed. Susan Mann Trofimenkoff and Alison Prentice (Toronto: McClelland and Stewart, 1979) 125 at 139, notes 69, 70-74.

131 See E. J. Bensen, *Proposals for Tax Reform* (Ottawa: Queen's Printer, 1969) at 14-17.

These transferable exemptions and deductions related to pension income, registered retirement saving plan contributions (RRSPs), medical expenses, and other items previously treated as being claimable only by the individual spouse,[132] and they account for a great deal of the 'hybridization' of the individual tax unit in Canada.

The only other significant change that has been made to this system of spousal and transferable tax benefits was the conversion in 1988 of all these items into tax credits. The stated purpose for this change was to improve the equity of the tax system. Long criticized for their 'upside-down' effect, giving taxpayers with higher incomes and therefore higher marginal tax rates larger financial rewards for the same exemptions and deductions claimed by lower-income taxpayers, the spousal and transferable deductions were reframed as tax credits in order to give each eligible taxpayer exactly the same maximum tax benefit.[133] It is this spousal credit plus all of the transferable credits that were in 1993 extended to all heterosexual cohabitants and in 2001 will be fully extended to all lesbian and gay cohabitants.

Despite the change from an exemption to a credit and the annual adjustment of the income cutoff used to regulate access to the credit, the spousal/cohabitant credit is still more or less identical to the exemption initially enacted in 1917. As joint taxation measures, the married and transferable credits have the same financial and economic effects as other forms of joint taxation. The fact that they are now delivered in the form of credits against federal tax payable instead of as deductions from taxable income does not alter these effects:

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132 See, eg., ITA former s. 110.3, added by S.C. 1976-77, c. 4, s. 46, applicable to 1976 *et seq.*

133 Department of Finance, *Tax Reform White Paper* (Ottawa: June 18, 1987) (Mr. Wilson).

(a) They represent state support of dependent adult partners;

(b) They are not factually available to taxpayers whose incomes are so low that they cannot afford to support two adults on them;

(c) Thus they will be less available to taxpayers whose incomes are depressed because of gender, race, sexuality, or ethnic origin;

(d) From a distributional perspective, they confer more benefits on middle- and high-income taxpayers, who can be considered to be less needy than lower-income taxpayers and who will tend to be non-raced heterosexual males;

(e) These deductions help subsidize the provision of non-waged domestic services to middle- and high-income taxpayers who can afford to support an economically dependent spouse;

(f) They form hidden barriers to the wageforce participation of the spouse with the lower income, which disproportionately encourages women to substitute non-waged domestic work for waged work; and

(g) On an aggregate level, they provide disincentives to women's labour force participation, depress the labour supply, and intensify women's poverty.

The annual cost of the married tax credit, the equivalent-to-married credit, which is available only to single parents, and the transferable credits changes somewhat each year. Using the married tax credit and the transferable spousal credits as an indicator, removing spousal treatment from the *Income Tax Act* would increase federal revenue by approximately $3.5 billion (2000 projection). In addition, taxpayers would lose the benefit of some $2.5 billion in deductions for alimony paid, and outside the ITA, would lose another $.5 billion if the spousal pension allowance paid under the *Old Age Security Act* were withdrawn.

While these revenue effects are relatively small, they are distributionally regressive in impact. The distribution of the married tax credit, the equivalent-to-married credit, and the transferable spousal credits all reflect deeply-entrenched income inequities. The distribution of the equivalent-to-married credit is 'bottom-up.'

In contrast, the distribution of the married credit remains 'upside down.' Supporting-spouses with low incomes get the smallest benefits from this credit, while spouses with higher incomes get larger benefits. This result may seem counter-intuitive, because the reason for replacing the old married deduction with tax credits in 1988 was to eliminate the 'upside-down' effect of the deduction. That change did improve the distribution of the married credit to a certain extent, but because taxpayers with middle to low incomes cannot support both themselves and an economically-dependent spouse on such incomes, those taxpayers lose the benefit of the credit when their spouses enter the waged labour force.[134]

If the distribution of the married credit or the equivalent-to-married credit were neutral as to income class, then the percentage of claims of each credit by members of each income class would be the same as the percentage of the claimants in each income class. This is not the case (table 4-1). Although 42 percent of taxpayers fell into the lowest income class, only 7 percent of the married credit was distributed to those with incomes under $10,000. Those with higher incomes (up to $30,000) represented only a third of all taxpayers in this category, but

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134 The conversion of the section 109 exemptions and some of the other transferable deductions into tax credits has been described as promoting tax equity, especially for non-waged women who might enter waged work. In its White Paper on tax reform in June 1987, the government argued that as a credit, the married exemption would remove the disincentive for married women to enter waged work because her first earnings would no longer be taxed at the higher marginal rate of her supporting spouse, but would tax them at her marginal rate. (The same reasoning applies to the transferable credits.) In fact, this effect arises not from the fact that these tax benefits are now in the form of credits, but from the fact that the disappearance formula for the calculation of the husband's spousal credit is calculated at the wife's marginal rate on her first earnings, not on her husband's marginal rate.

they received a much higher share of the married credit than did those with incomes of $10,000 or less (41 percent). And while more than a third of all taxpayers who claimed one of these two credits had incomes between $10,000 and $30,000, they received less than one-third of the married credits: only 30.7 per cent of the credit was claimed by the class with 36.8 per cent of the taxpayers.

Table 4-1: Distribution of married/equivalent tax credit, by income class, 2000

Base consumable income class	Number in class (%)	Equivalent credit (%)	Married credit (%)
Up to $10,000	42	99.94	7
$10,001 to $30,000	31	0.06	41
Over $30,000	27	–	53
Total	100.0	100.0	100.0

Source: SPSD/M version 7, adjusted to 2000.

Over half the claims for the married credit are concentrated in the highest income category. Only 27 percent of taxpayers fell into that income class, but they claimed 53 percent of the benefits. This demonstrates that it is predominantly higher-income taxpayers who can afford to support two adults on one income. The only relevant test for eligibility for the married credit is having a single middle- or high-income earner. Once that criterion is satisfied, single-income couples can take advantage of the credit no matter how high that income may be. In contrast, almost all claims for the equivalent-to-married credit are concentrated in the lowest income category ($10,000 or less). This credit is for single parents only. Not surprisingly, women taxpayers are significantly over-represented in this category. Almost no taxpayers with incomes of more than $10,000 claim this credit.

The transferable credits suffer from similar distributional problems. As demonstrated in table 4-2, when tax credits transferred from one spouse to another are analyzed by income class and by gender, transfers are heavily skewed in favour of male claimants at a ratio of nearly 10 to 1 (the same ratio holds for the married credit as well). Less than 11 per cent of all transferred credits are claimed by women. Within each gender, relatively few transferred credits are claimed by taxpayers of either gender in the $10,000 and under income class, while claims are disproportionately high in the highest income classes. Distributionally, taxpayers whose incomes are affected by race, sexuality, ability, or other disadvantaging characteristics will be similarly disadvantaged in claiming these credits.

Table 4-2: Distribution of transferred credits, by income class and sex, 2000

Income class	Men ($ million)	Women ($ million)	Both ($ million)
Up to $10,000	9.0	7.3	16.2
$10,001 to $20,000	128.9	17.2	146.1
$20,001 to $30,000	78.1	6.0	84.1
$30,001 t0 $40,000	41.1	3.1	44.2
$40,001 to $50,000	21.1	1.9	22.9
$50,001 to $60,000	13.6	1.2	14.8
Over $60,000	23.1	2.0	25.1
Total	314.8	38.6	353.4

Source: SPSD/M version 7.1, adjusted to 2000.

On the economic level, these dependency benefits -- both the married credit and the transferrable credits -- encourage women to substitute non-waged domestic work for waged

work.[135] The substitution effect contributes to women's low incomes because it offers an incentive for low income workers to leave waged work and work in the non-waged domestic economy. This in turn helps support higher wages for the remaining workers at the same time that non-waged domestic workers provide very cheap domestic labour to their supporting partners. The end result of this non-waged domestic work may be to support their partner's ability to earn money incomes, but more money and wealth is left in the hands of supporting spouses and less in the hands of dependent partners. In addition, the cash value of this tax benefit goes to and is owned by the supporting partner.

Despite the distributional and equity problems with the married and transferable credits, they have been staunchly defended in many quarters. It has been argued, variously, that women who do have children should remain in the home to care for them while they are young; that women whose spouses can afford to support them should work in the home even if they have no children; and that women who probably did withdraw from waged labour deserve some support later in life in order to help maintain that lifestyle without added hardship.

None of these justifications square with data on the relationship between being married, having children, and qualifying for these benefits. Not all couples who qualify for the credit have children. Not all children are raised by such couples. Not all children raised by such couples are young enough to need someone home with them -- many of them are grown. Many qualifying couples are too old to be likely to have children. In any event, the married and transferable credits say nothing whatsoever about having children. On their faces, they are credits for dependent adults no matter what the rest of the family composition. In addition,

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135 See Eden Cloutier, *Taxes and the Labour Supply of Married Women in Canada* (Ottawa: Economic Council of Canada, 1986) for discussion of this effect in the Canadian context.

these credits are badly targeted, whether they are considered on their own merits or are considered in conjunction with the equivalent to married credit for single parents. Less than half of this credit goes to married couples with young children each year.

Because the married and transferable credits do function efficiently to funnel public benefits to the highest-income taxpayers, they should be repealed. Even transfers of disability and age credits reflect the same pattern. If the government wishes to continue directing some additional assistance to individuals who are disadvantaged by age or ability, then direct expenditures would be more effective.

Policy alternatives: At one extreme, the Carter Commission recommendations on family-wide income splitting remain extremely attractive to single-income couples and to couples with markedly unequal incomes. Optional models (*eg.* Spain) would also be attractive because they would offer such couples the largest possible scope for income-splitting and thus for tax reduction. These models would confer smaller benefits on middle-income couples and essentially none on low-income couples.

Notwithstanding their attractiveness to single-income couples, and particularly to those with high incomes, the overall equity of the income tax system would be improved by removing joint spousal elements from the legislation and bringing it more closely into line with the individual model of taxation (such as the Swedish model). Budgetary surplus that would result from this change should be used to lower the bottom tax rates and to enrich personal credits, thus reducing the regressivity of the income tax system at the lower end of the income curve.

Recommendation 1: Repeal the married credit: This would have the same effect as the 1981 introduction of the two-earner credit (maximum value of $6,000), but would be superior in that it would directly eliminate the source of the non-neutrality. The U.S. two-earner deduction ameliorates the joint filing rules.

Recommendation 2: Repeal the transferable credits: Direct support for older, incapacitated, and learning adults is more consistent with equity than are tax credits that favour higher-income taxpayers over lower-income taxpayers.

Recommendation 3: Replace the dependent spouse credit with enriched state support for children: Dependent child credits would function as a direct subsidy to households with children without affecting adult work choices. However, such subsidies are better delivered as direct non-taxable benefits, especially because they would have to be fully refundable to low- and nil-income taxpayers in order to reach all needy families with children, and because tax credits do not reach those who are not tax-filers (more women than men fall into this category).

Recommendation 4: Reduce the regressivity of the lower income tax rates: Increased personal credits and reduced low income tax rates would benefit all taxpayers with low incomes, including couples whose incomes are too low to take advantage of the married and transferable credits. This would also improve the overall equity of the income tax system without creating new tax advantages for higher-income taxpayers.

Alimony deductions: Until 1942, alimony payments were treated just like all other after-tax consumption expenditures -- they were not deductible. In 1942, a tax credit for alimony paid was adopted. This credit remains unique in that it permitted a taxpayer who paid alimony to claim as a tax credit the amount of income tax probably paid by the recipient on that amount. Instead of looking at the recipient's income tax return in order to fix that amount, however, the

credit was calculated using the recipient's lowest marginal tax rate.[136] Two reasons were given for this change: to give men a tax incentive to make their support payments, and to eliminate tax barriers to men's remarriage.[137] This method of calculating the tax benefit was extremely unpopular because it generated quite small tax credits. In 1944, the government replaced it with the current deduction system, which increased the value of the benefit for most payers.[138]

This system has remained substantially unchanged since then. The Carter Commission did suggest that payers be allowed to deduct lump sum settlements as well as periodic payments, but otherwise it appeared to be satisfied with the status quo.[139] In the mid-1970s, the deduction was expanded further to include third party payments, payments to cohabitants, and other administratively contentious items.[140] By this time, the Advisory Council on the Status of Women questioned the deductibility of alimony payments of any kind,[141] but subsequent changes in the 1980s continued to focus on securing deductions for all forms of alimony payments as the support obligations of cohabitants became more widely recognized.[142]

The financial and economic effects of the alimony deduction are similar to those of the dependent spouse credit. From the perspective of the payer, these deductions subsidize what is often the non-taxed domestic work of the recipient, who is frequently a divorced or separated single parent. From the perspective of the recipient, including alimony payments in the tax base

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136 *Income War Tax Act*, ss. 3(1)(H), 11, enacted by S. C. 1942-43, C-28, s. 3.

137 House of Commons, *Debates*, 1942, vol. V, at 4360.

138 *Debates*, 1944, vol. IV, at 4178.

139 Carter Commission, *Report*, vol. 3, at 130.

140 See ITA ss. 56.1 and 60.1; *Interpretation Bulletin* IT-118R, para. 9-12 (August 30, 1976).

141 Canadian Advisory Council on the Status of Women, *Statements on Taxation* (Ottawa: CACSW, 1977) 1.

142 See ITA ss. 56.1 and 60.1, added by S.C. 1980-81-81-81, c. 48, s. 29(2); Income Tax Regulations s. 6502 (express provision for Ontario family law); ITA ss. 60(c.1) and 56(c.1).

reduces the financial value of the payment beyond the level needed for actual support at the same time that the payer receives assistance from the state in making the payment. The difference between the higher-income payer's marginal tax rate and the lower-income recipient's tax rate means that the size of the subsidy given by the state to the payer may well exceed the amount of tax revenue received from the recipient on that payment.

Even after a divorced man remarries, the combined effect of the tax subsidies flowing from the alimony deduction and the married tax credit claimable in relation to a second wife cushions the effects of divorce on men's after-tax incomes. This means that financially, the tax system offers men incentives to remarry after divorce, but continues to provide incentives for both divorced and married women to focus their work efforts on the domestic non-waged sector. Depending on income levels, the combined effect of these two provisions could well leave the payer in roughly the same financial position he was in before divorce, yet create incentives for two different women to concentrate on unpaid domestic labour in two different households. At the same time, not all other types of support payments are deductible.[143]

Policy alternatives: Repeal the deduction-inclusion provisions; convert the deduction to a tax credit but leave inclusion in place; replace the entire system with state-administered support schedules and administration as with child support; extend the system to payments ordered by courts in favour of parents or other family members.

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143 See, for example, Wendy Bernt, 'Lines of Dependence: The Rebirth of Parental Support Legislation in Canada' (1996) Appeal 52. Bernt notes that all ten provinces have legislated provisions for parental support in situations in which the parent has a history of supporting the child, the parent can establish some form of need or dependency, and the child has the financial capacity to provide support.

Recommendation 5: Repeal the alimony deduction: **This** would increase women's after-tax alimony income and would eliminate tax deductions that support the continued non-waged domestic work of women after divorce or separation. The resulting increase in alimony income would support the acquisition of childcare services for women, and would re-establish that alimony payments are pure consumption expenditures on the part of payers.

II. 'Family Wage' Benefits

In the 1920s, as women gained increasing access to employment, wage discrimination was justified on the basis that men had to bear the costs of courting and then supporting women. The 'family wage' resulted in higher pay scales for men than for women. Prohibited since the 1950s, a gender-neutral version of the 'family wage' survives in the form of several types of tax exemptions. Unlike the married credit and other dependency benefits, 'family wage' types of tax benefits are not restricted to single-income couples or to situations of economic dependency. Any taxpayer with a spouse can qualify for these types of benefits. Two general types of benefits fall into this category: tax exemptions for employee fringe benefits that are actually received by the employee's spouse (for example, benefits under employer-paid medical insurance, dental plans, or counselling services, and employer-paid moving expenses[144]), and tax deductions or credits for expenditures on retirement security, medical care, or other care of a spouse.[145]

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144 The list includes extended hospitalization, drug, nursing, dental, optical, or medical care plans; education benefits such as tuition waivers; insurance coverage; employee discounts; survivor benefits; death benefits; employer-financed housing; and low interest or interest-free loans for various purposes. ITA, ss. 5, 6; s. 8 (railway workers are entitled to deduction for cost of maintaining home occupied by spouse); s. 146 (deductible contributions to spouse's RRSP).

145 See Appendix G for a list of income tax provisions that magnify the value of 'family wage'-type benefits by exempting them from taxation.

Like the older cash version of the 'family wage,' the tax exemption of employer 'fringe' benefits and the tax deduction/crediting of private expenditure both violate principles of horizontal and vertical equity. Using the language attributed to the Carter Commission, 'a buck is a buck,' and the fact that employment compensation may take the form of in-kind consumption rather than cash was not, in the view of the Commission, sufficient reason to exclude it from employment income. The centrepiece of the Commission's revisioned concept of 'income' was styled the 'comprehensive tax base,' a direct adaptation of the Haig-Simons economic definition of income (income equals the fair market value of all rights exercised in consumption plus the net change in the value of assets over the accounting period). The only deviation from that principled definition of income contemplated by the Commission was the reduction in tax burdens 'for those who have special responsibilities and obligations that impose non-discretionary expenditures.'[146]

The taxation of employee fringe benefits had long been a point of contention between Revenue Canada and taxpayers, and certainly one of the results of the Carter Commission recommendations has been the abolition or rationalization of many previously-exempt or lightly-taxed employment benefits (see generally ITA section 6). The Commission made no distinction between medical and health-related employee benefits and other types of fringe benefits, recommending that employer contributions to public medical care plans be classed as taxable benefits. The Commission also recommended that any services or reimbursement flowing from such medical care coverage be exempt from taxation. When reporting on its plans to implement the Commission report, the government agreed generally with these proposals, but indicated that employer contributions to public hospital care plans should also be treated as taxable benefits. It was clearly understood that expenses paid or recoverable from public plans could

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[146] Carter Commission, *Report*, vol. 1, at 8-10, 19.

be considered to be medical expenses or taxable income because of the diversity of provincial funding mechanisms being used.[147]

Despite this attempt to widen the tax base, employer contributions to private health services plans, such as dental or drug plans, are not considered to be taxable employment benefits, even when those plans extend to the employee's spouse or family. Other employee benefits such as registered pension plans (RPPs) and other deferred payments are also tax-exempt during the life of the plan, and if deferred compensation is not withdrawn from such plans until an employee's spouse has become the beneficiary by virtue of survivorship, tax deferral plus income-splitting will reduce the overall tax load on such forms of compensation.

The motivation for these new forms of the 'family wage,' like the older form, arises out of the view that conjugal and familial relationships deserve support by the state as well as by the private employment sector. These forms of the 'family wage' create special subsidies for people whose partners are treated as spouses. When the subsidy effect flows from the employment arena, compensation directed to the purchase of employee fringe benefits for married or coupled employees comes out of the compensation available to be divided among all employees generally. The benefits of spousal features are limited to coupled employees, and lack of access to these benefits on the basis of relationship status disadvantages non-coupled employees. Tax exemption compounds this disadvantage. The revenue foregone because of the tax exemption is disproportionately borne by those taxpayers who do not receive those or similar tax exemptions. Like the non-taxation of unpaid domestic work, it is difficult to conceptualize the omission of an item from the tax base as conferring a tax benefit on any

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147 Benson, *Tax Reform Proposals*, at 17.

group, but the benefit effect lies in the fact that some classes of taxpayers do not have access to the tax-favoured transaction.[148]

Single employees and taxpayers subsidize those who receive spousal fringe benefits and tax exemptions for those benefits. But two-income couples also subsidize the fringe benefit/tax exemption system as well. Two-income couples who both qualify for fringe benefits generally cannot both fully use them. Nor can they turn them into higher wages. By reducing the cost of the operation of one of their plans, two-earner couples subsidize single-income couples. Family wage-type benefits also further drive the wedge between benefit-bearing jobs ('primary employment') and non-benefit-bearing jobs. Once the members of a family are covered by the benefits plans of one employer, a second income-earner can look for employment in the part-time, seasonal, or non-benefit-bearing employment sector. Thus the existence of employee benefit plans and their tax exemptions tends to reinforce gendered employment patterns.

The net effect of these private and public spousal benefits is that all classes of employees end up subsidizing single-income couples in an area that accounts for a growing share of overall employment compensation. Most solutions to this problem have focused on how to extend similar benefits to single employees, enabling anyone to make a 'beneficiary election' that will generate the same benefits for nonrelated beneficiaries. The problem with this approach is that it increases the costs of these benefits to employers and to the government without necessarily addressing the fact that non-coupled employees do not necessarily have someone to whom they may wish to direct these benefits. Extending benefits and exemptions to adult children, or

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148 Edward J. McCaffery, *Taxing Women* (Chicago: University of Chicago Press, 1997) 126, has the most complete analysis of this issue in the U.S. context.

parents, or grandchildren, collaterals, or others could well widen the gap instead of narrowing it as more and more people in a group have overlapping coverage.

Thus any solution to the problem of private and public 'family wage' benefits should include three other features: an election to monetize unneeded benefits plans; the right to opt back into the plan whenever needed and without undue delay; and extension of benefit options to part-time, occasional, and seasonal workers. Absent such modifications, fringe benefits themselves and the tax exemptions given to them are forms of joint taxation. Some of these benefits permit limited income-splitting in some circumstance (retirement funding falls into this category), others permit the taxpayer to essentially split income by deducting expenses incurred in relation to the spouse. They all have the same financial and economic impact associated with dependency tax benefits: they tend to benefit high- and middle-income taxpayers differentially, they tend to provide incentives for the economic dependency of lower-income spouses, and they offer state subsidies for adult relationships.

Policy alternatives: Judicial decisions and Bill C-23 have extended most of the employee benefit tax exemption provisions to lesbian and gay couples. This satisfies the formal requirements of equality and equity. However, the continued denial of actual spousal benefits to lesbian and gay employees in many provinces means that this tax exemption is of no use to lesbian and gay employees. Further action on the provincial level is obviously needed. Beyond that, the serious question of uneven access to these benefits, the impact of benefit packages on two-earner couples, the subsidy effect, and the growing gap between full-time and part-time employees suggests that this area of routine inequity is reaching the point where major restructuring is necessary.

Two basic reform options exist. One is for all levels of government to work together to ensure that all workers have access to benefit programs, and that overlaps in coverage for two-income couples are reconciled in favour of maintaining the after-benefit and after-tax incomes of lower-income workers -- basically, by permitting them to opt out[149] with a right of return. The problem is that this addresses gender disparities within two-income couples, but it does not eliminate biases against single employees or those with limited access to formal employment in the first place. Canada is better placed than many countries to extend essential benefits to unemployed people, but the single employee subsidy effect is significant. Thus the second reform option would be to extend fringe benefits and tax exemptions for those benefits to a larger class of beneficiaries, perhaps using a reciprocal beneficiary model as was used for a short time in Hawaii before it adopted registered domestic partnership legislation. If fringe benefits can be made available to a wider non-conjugal group of relatives or even elected beneficiaries, then the purposes of the tax exemptions will be achieved more effectively and on a more even-handed basis.

> **Recommendation 6: Extend tax exemption of employee benefits to non-spouses:** The 'menu' of employee benefits is continually growing in response to the most pressing needs of employees and to changing social conditions. Given the net revenue involved in tax exemption for basic medical, dental, hospital, and health-related employee benefit plans, this might be the best place to begin recognizing benefits extended to non-spouse adults such as siblings, parents, grown children, or long-term companions with whom the taxpayer lives on a basis of some permanence. Waiver of benefits in exchange for cash, extension of benefit plans to marginal workers, and opt-in rights would improve coverage and minimize existing inequities.

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149 This is the solution favoured by McCaffery, *Taxing Women*, at 134.

Recommendation 7: Retain spousal limits on income-splitting retirement provisions: Property-related provisions like the deduction rules for RRSP spousal contributions, scope of survivor options under RPPs, and eligibility for death benefits should remain limited to those recognized as having at least expanded family connection with the taxpayer. Wider deductibility or income splitting could create new opportunities for tax avoidance.

III. Family Sharing of Incomes and Property

Since the mid-1970s, family property law has increasingly recognized the property rights of married and cohabiting women in Canada. Instead of merely holding inchoate dower rights and other limited forms of interest in family property registered in their husbands' names, married women have acquired the rights of inchoate community property, giving them the right to claim up to half the net family estate upon divorce or death.[150]

When capital gains taxation was implemented in 1972 at the recommendation of the Carter Commission, family property transactions involving capital property became just as taxable under the new capital gains rules as did any other transactions. This meant that transactions between adult partners could force the realization of capital gains or income, with resulting increases in tax liability that would not have been imposed before 1971. These transactions include disposition of the family home, division of other family property, and forced shares of decedents' estates.

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150 See for example *Family Law Act*, R.S.O. 1990, c. F.3, Part I, section 5(1), (2); section 6(1)-(13); Part II; *Succession Law Reform Act*, R.S.O. 1990, c. S.26, Part I, sections 44-46.

The interaction between contemporary family property law and the capital gains rules brings two seemingly contradictory types of tax provisions into operation: attribution rules and 'rollovers.' **Attribution rules** are anti-avoidance rules that are designed to prevent income from leaving the hands of one person (the donor) and being treated as the legal income of another person for tax purposes. They operate by 'attributing back' to the donor the amount so transferred. Attribution rules grew up with income taxation in Canada, and are often described as protecting the individual principle of taxation.[151] In essence, they prevent high-income and property-owning couples from shifting property ownership to split their incomes and thereby reduce their taxes.

Until 1979, the attribution rules had draconian gender dimensions: any income deriving from one spouse to another was irrefutably deemed to remain the income of the payer spouse. This rule applied not only to transfers of all income-producing property,[152] but also to earnings from family businesses of all types, including sole proprietorships, partnerships of which a spouse was an employee,[153] partnerships of which both spouses were members,[154] and spousal employees of incorporated family businesses.[155] One very serious consequence of these rules, especially as they related to family businesses, was that they effectively appropriated what would have been women's ***paid*** labour and turned it into the husband's property by denying salary deductions and denying the existence of family business partnerships for tax purposes.

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151 Catherine Brown and Faye Woodman, 'Taxation of the Family' in Brian G. Hansen, Vern Krishna, and James A. Rendall, ed., 'Canadian Taxation' (Toronto: Richard de Boo, 1981) 987 at 988-997.

152 ITA former section 74(1), repealed by S.C. 1986, c. 6, s. 37, applicable to transfers of property after May 22, 1985, but functionally replaced by new section 73.

153 ITA former section 74(3)-(4), repealed by S.C. 1980-81-82-83, c. 48, s. 40(1), applicable with respect to remuneration paid after 1979 for services rendered as an employee after 1979.

154 ITA former section 74(5), repealed by S.C. 1980-81-82-83, c. 48, s. 40(1), applicable to fiscal periods ending after December 11, 1979.

155 This was achieved through discretionary challenges to the 'reasonableness' of deductions for spousal salaries under ITA s. 69, which is still in effect.

This appropriation had a second-order effect as well: without earned income of their own, women in Canada could not accumulate CPP, UI, RRSP, or RPP credits of their own. They were completely uninsured workers, and could look, at best, to some share or spousal benefit flowing from their husband's CPP, RRSP, or RPP coverage for social security. Even after repealing these gendered attribution rules, the federal government never took any steps to go back and remedy the denial of CPP coverage during the pre-1980 period, with the result that many women still do not have independent CPP coverage. (See chapter five re penalties.)

With the emphasis on the 'pooling' and 'sharing' features of the marital union in the Carter Commission *Report* in the mid-1960s, a new approach to income-producing property slowly began to work its way into the structure of the *Income Tax Act* as capital gains taxation came on stream in 1972. Having committed itself to the view that the couple is indeed an economic unit, and being confronted with the growth of married women's property rights under revised provincial family law, a dual policy approach unfolded in which the tension between 'wife as tax avoidance vehicle' and 'marital sharing' were worked out. At the same time that new attribution rules were devised to close off loopholes that spouses could exploit (loans from controlled corporations, etc.),[156] new ***spousal rollovers*** were created in order to recognize marital sharing and women's marital property rights.

Spousal rollovers have exactly the opposite effect of the older attribution rules. Under the attribution rules, transfer of capital property that would produce a capital gain when sold would have resulted in the gain being attributed back to the transferor. Under the spousal rollover rules, the same transfer produces no taxable gain at the time of transfer, and when actual gain

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156 ITA ss. 74.1 and 74.2 (loans of property to spouse), 74.4 (loans from controlled corporation), and 74.5(11) (reverse attribution schemes).

is realized by the second spouse, all the gain that had accrued while it was held by the first spouse as well as by the second spouse is treated as the taxable gain of the second spouse. Gain that would ordinarily be realized upon a transfer from the first spouse to the second is 'rolled over' to the second spouse and recognition is deferred until actual disposition occurs some time later. These rollovers apply to *inter vivos* transfers and transfers at death.[157]

Spousal rollovers were initially formulated to deal with the fact that especially as provided in family law reform legislation, both spouses can be considered on the basis of equitable principles to have 'owned' property at least from the time of marriage. To have treated transfers of title that might reduce those equitable interests to legal title as triggering liability for income taxes payable on capital gains flew in the face of the nature of such equitable interests and would have impaired the value of family property even though no actual economic transfer might take place. Because they were initially designed to coordinate the implementation of provincial family law reform and capital gains taxation, the new spousal rollovers were initially crafted to operate only when provincial family law formed the basis for transfers of title between spouses.[158] Gradually, however, they were reshaped around the larger principle of joint property interests arising from the marital relationship.[159]

As the wife's individual rights of property ownership which were being expressed in provincial family law reform status were given fuller recognition in the *Income Tax Act*, spouses were

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157 ITA ss. 73 (inter vivos transfers'), 70(6) (transfers on death). See also ITA s. 73 (transfers to child) and s. 110.6 (permitting inter-spousal transfers of the capital gains exemption). A more extensive list of some of the most important provisions that have this effect may be found in Appendix H.

158 Budget of November 16, 1978 (Mr. Chrétien), implemented S.C. 1979, c. 5.

159 Budget of December 11, 1979 (Mr. Crosbie), not implemented until S.C. 1980-81-82-83, c. 48, because this provision was included in the budget that brought down Mr. Clark's minority Conservative government.

finally permitted for the first time in 1980 to agree to be governed by neither attribution rules nor rollover rules -- that is, they were permitted to elect to treat a transaction as if it had occurred at fair market value. This makes it possible for two spouses to split accrued capital gains between them consistent with the date of actual transfer of the property.[160] Further changes have clarified that spousal rollovers apply to all forms of property, and in 1993, were extended to unmarried heterosexual cohabitants. These rollovers are extended to lesbian and gay cohabitants as of 2001, or as far back as 1998 if they so elect.

Attribution rules are clearly tax penalties. Spousal rollovers are not strictly benefit-conferring provisions as such, but are designed to insulate from income taxation those transactions in family property that would otherwise technically trigger income tax liability. While family property rules affect redistribution of property within the family unit or between adults in relationships, they do not change the net wealth of the couple as such. They do affect the individual property rights of each person as against the other, but together, the couple is no richer or poorer as the result of family property transactions.

The net result of the repeal of the worst attribution rules and the emergence of spousal rollovers has been the removal of significant income tax barriers to women's property ownership. In this sense, spousal rollovers are entirely beneficial and have no substantial penalty effects. However, they appear to be more 'equally' available to cohabitants, lesbian/gay couples, and members of other historically-disadvantaged groups than they actually are. Spousal treatment in income tax law does not create spousal status in provincial family property law, and thus many of these beneficial rollovers will remain completely irrelevant to lesbian and gay couples,

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160 Notice of Ways and Means Motion accompanying Fiscal Statement of the Minister of Finance (Mr. MacEachen) (April 28, 1980, implemented S.C. 1980-81-82-83, c. 48.

who cannot marry, because they cannot seek shares of decedent's estates on intestacy nor division of the matrimonial estate under property law unless they become able to marry. The same is true of heterosexual cohabitants, although some of them may be able to access these benefits by marrying. Members of other historically-disadvantaged groups, such as people characterized by race or ability, have less access to property itself, and thus will be differentially excluded from the distribution of these benefits as well. Although spousal rollovers are far more beneficial as joint taxation measures than the old 'husband owns all' attribution rules, they still functionally reinforce the income advantages of married single-income couples and of married couples generally.

Policy alternatives: Permit full income-splitting for all conjugal couples; withdraw rollover treatment for intra-couple transfers; expand application of equitable ownership to facilitate intra-couple division of property interests without generating tax liability.

> ***Recommendation 8: Intra-couple rollovers that promote equitable sharing of family property and incomes should be retained:*** These types of rollover provisions give effect to equitable interests in family property and incomes that have been denied under older family property law regimes. Wherever it is reasonable to consider that the recipient spouse has contributed to the acquisition, improvement, or maintenance of the asset in question, transfer of all or part of the interest to that spouse should not be considered to be a 'disposition' for purposes of income tax law.
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> ***Recommendation 9: Rollovers should not be extended to other adult relationships:*** The use of corporations by non-related taxpayers who seek to avoid recognition of income or capital gains has demonstrated that opportunities for tax minimization in this area would be eagerly pursued and would likely make the administration of the legislation more difficult. Reliance on equitable principles would represent a more substantively-controlled approach to this issue

than would statutory criteria that would open up these rollovers to those whose primary motivation may well be purely market-based.

CHAPTER FIVE

JOINT PENALTY PROVISIONS

All tax and direct benefits can be thought of as imposing 'penalties' on some people if their behaviour does not qualify them for the item in question. Thus, even provisions such as graduated tax rates can be thought of as 'penalties' in that a taxpayer whose income is too high to fall entirely in the lowest bracket has to calculate tax payable partially at the higher rate. Eliminating the penalty effects of regressive taxation in Canada would be the single most effective method of improving the distribution of after-tax incomes, but numerous specific penalty provisions contribute to this overall regressivity and should be addressed as well. These specific penalty provisions arise out of the eligibility criteria surrounding provisions that are intended to ameliorate non-neutralities and inequities created by the tax system itself as well as those generated by the market economy.

This chapter examines penalty provisions that can be described as 'joint' because they treat some form of the adult couple as the relevant tax or benefit unit when calculating eligibility for various transfer payments. It is worth noting at the outset that unlike the joint benefit provisions discussed in chapter four, many of which are deeply rooted in Canadian income tax policy, joint penalties are very new additions to tax and transfer provisions. All of these joint penalty provisions postdate the publication of the Carter Commission *Report*, and some of them, such as the family-income means-testing of the current child benefit program, replace older individual benefit schemes that did predate the Carter Commission.

To what does Canadian tax and transfer policy owe these joint penalty provisions? Some might say that they are merely the most recent trend in tax/transfer policy, and point to the proposal or adoption of similar measures in other jurisdictions over the last decade. But this is not entirely accurate. In fact, Canada has moved perhaps more extremely than any other jurisdiction away from universal, individually-based benefits, such as the child benefit, and in the direction of joint income tests to limit benefits. Unlike other jurisdictions that have adopted this approach to the delivery of social benefits, Canada alone offers much less generous benefits even though they are now means tested.[161]

The explanation for the trend toward joint penalty provisions in Canada appears to lie in two factors. One is Conservative control of the federal government during a relatively long period of time. Appeals to the 'mutual' or 'shared' nature of marital existence resonate with some of the recommendations of the Carter Commission on the taxation of the family, and give a progressive flavour to policies that, because they are benefit-limiting instead of benefit-conferring, might otherwise be greeted with suspicion. The other factor is the structural decision to insert welfare provisions, like the child benefit and the GST credit, into the income tax system instead of leaving them to stand alone as direct benefit programs. Regressive penalty provisions tend to be less visible when they are woven into the complexities of the *Income Tax Act*.

Indeed, joint penalties have come into increasing use during the same period of time in which there have been increasing political demands for joint taxation, tax benefits for single-income couples, and flattening of the rate structure of the overall tax mix. Thus, increased use of joint penalties in the name of improved 'target efficiency' can be seen as one of several structural

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161 Baker, *Canadian Family Policies*, at 152-55.

devices that have all been directed toward the goal of shifting the overall tax system toward flatter rates, reduced government spending on social assistance, and larger after-tax incomes for higher-income taxpayers.

Generally, joint penalty provisions are primarily directed at low-income taxpayers instead of at all taxpayers (*cf.* the general application of joint filing is in the U.S.). The 'penalty' effects examined here arise -- as in the *Poulter* and *Falkiner* cases discussed in chapter one -- when low-income benefits are cut off on the basis of combined couple incomes instead of on the individual incomes of adults.

Many different tax and expenditure provisions use some form of 'joint penalty.' Instead of examining them provision by provision, which runs the risk of losing the main focus in the mass of detail surrounding each provision, the basic types of joint or couple-based penalties are examined from the perspective of their structural impact in order to evaluate alternative approaches that might reduce their 'penalty' effects. These categories are:

(1) the 'tax on marriage' effect that arises when eligibility for low-income benefits is based in couple income, not on individual income;

(2) means-tested low-income cutoffs (LICOs), which base eligibility for benefits on the combined incomes of deemed spouses;

(3) provisions that prevent some adults from deducting unavoidable work-related expenses such as child care;

(4) attribution rules, which create disincentives to sharing of incomes and property between partners;

(5) deemed non-arm's-length rules, deemed conflict of interest, and other anti-avoidance rules that presume couples to collaborate re benefits.

Functionally, these joint penalties have exactly the opposite effect of joint dependency benefits: instead of giving tax benefits to an income-earning adult who supports an economically-dependent spouse to help carry that burden, joint penalties deprive partners of tax benefits. The privatizing effect of joint penalties comes about as loss of government benefits increases financial need. The expectation is that the income-earning partner ought to assume the primary burden of support, and that the state ought to be the last resort. Such targeting measures operate by looking to couple income or to the existence of adult relationships to deny or reduce benefits. Thus, they deny the low-income person the right to be treated as an individual, sometimes even in contexts in which he or she functions socially and economically as an individual.

Joint penalties can be criticized on two grounds. Distributionally, they are a growing cause of the regressive impact of income taxation in Canada. Rough revenue estimates that posit extending spousal treatment to all couples in Canada -- conjugal as well as non-conjugal -- demonstrate that some additional $200 million in revenue would be generated, largely as the result of treating individual beneficiaries of tax benefits and transfer payments as if they were married.[162] These losses would be clustered at the lowest end of the income scale, and would involve significant numbers of parents with children as well as elderly and infirm individuals.

On a social level, whether joint penalties are contained in tax or transfer provisions, they operate as 'anti-relationship' provisions. Instead of supporting or subsidizing adult relationships, as do joint benefits, they actually hold out a material incentive for people to move away from domestic intimacy in their relationships. The only way a person affected by joint penalties can escape their application is to leave the relationship. Ironically, at the same time that the federal

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[162] Estimate based on the year 2000, SPSD/M version 7.1.

government has been expanding the scope of spousal treatment -- first by treating heterosexual cohabitants as spouses and then by extending that treatment to lesbian and gay couples -- it has been increasing the fiscal costs of that relationship recognition. And at the same time that the values of self-dependence and individual responsibility have come to permeate federal and provincial families policies, joint penalties place a high price on diverse relationships in which the partners may (voluntarily or involuntarily) exhibit more egalitarian behaviours than more traditional married couples.

In addition to having anti-relationship and anti-egalitarian effects, joint penalties are regressive in impact and intensify the poverty and occupational stratification associated with gender, married status of women, single parenting, sexuality, race, and disability. Thus, they contribute to the pressure on women as a class to substitute unpaid labour for paid labour and, when women are partly or fully employed, to take on the double day or double shift in order to make up for the inability of the household to fully replace the loss of unpaid domestic labour with after-tax and after-expense profits. At the same time, they disproportionately deprive low-income two-earner couples of benefits they need more intensely because of their sexuality, ability, or race.

I. 'Tax on Marriage / Cohabitation'

The 'tax on marriage' or 'tax on cohabitation' type of joint penalty is used to improve the 'target efficiency' of low-income benefit provisions. 'Tax on marriage' provisions reduce benefits for couples as compared with single people. These joint penalties are justified on the basis that couples benefit from 'economies of scale' or 'economies of consumption' that are thought to arise because they are in a relationship. The exclusion of single people or non-conjugal

cohabitants from these rules is justified on the basis that they have no obligations to each other and ought to be viewed as independent economic units. Both social assistance programs and tax benefit provisions can employ 'tax on marriage' clauses. (Some benefit programs combine the 'tax on marriage' with LICOS to restrict both eligibility for and the size of state benefits. LICOS are discussed below.)

The 'tax on marriage' and 'tax on cohabitation' affect eligibility for two major income tax benefits -- the equivalent-to-married credit for single parents, which is worth around $1500 per year (combined federal and provincial amounts), and the GST single supplement, the value of which varies with the number of children. Although the GST credit is also subject to a low-income cutoff and benefit grind-down formula (discussed below), the 'tax on marriage/cohabitation' effect does not depend on income levels at all, but looks merely to the fact of cohabitation or marriage to determine benefit eligibility. This particular type of joint penalty is distinguished by its 'all or nothing' effect, and eligibility turns completely on adult relationships.

When the GST was enacted federally, the sales tax credit was replaced by the GST credit in light of the expected incidence of this tax.[163] Both credits were intended to ameliorate the admittedly regressive incidence of flat-rated consumption taxes like the sales tax or the GST. The GST credit has been offered at a reduced rate for taxpayers who are considered to be part of a couple. Although the GST credit is a low-income relief measure, the amount of the benefit is reduced on the premise that two low-income individuals who are in a conjugal relationship can live more cheaply than one because of 'economies of consumption.'[164]

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163 The result is the refundable tax credit system in section 122.5 of the *Income Tax Act*.

164 Department of Finance, *Technical Paper* -- GST (August 1989).

Table 5-1: Effect of family configuration on GST credit, 1999

	Individuals	Couple
One adult	$303	--
Two adults	$606	$396
One adult, one child	$501	--
Two adults, one child	$804	$501
Two adults, two children	$1,002	$606

Source: ITA, s. 122.5, adjusted for 1999 taxation year.

Most 'economies of consumption' formulas tend to reduce benefits to 70 per cent of two single benefits. The GST bites more deeply, reducing the individual amount for each member of a couple to 65 per cent of the individual GST benefit. For 1999, the full adult GST credit was $198. Single adults received an additional increment, a single adult supplement of $105. A single parent could claim, in addition to their own $198 adult credit and the $105 supplement, the adult credit of $198 for one dependent child plus a supplement of $105 for each additional child. In contrast, couples could claim $198 per adult, for $396 per couple, but did not receive the $105 single adult supplement for either of them, nor the $198 adult credit for any dependent child. As can be seen in table 5-1, the amount of the 'tax on marriage/cohabitation' depends on the specific configuration of the family. When two adults are deemed to be 'spouses' for purposes of the GST credit, they lose $210 each year between them. When one child is involved, the amount of reduction is $303 per year; if there are two children, the family loses a total of $396 in credit per year. (Lost federal credits are also magnified by the provincial layer of taxation, which can be as high as 58 per cent of the federal credit.)

On the aggregate level, policies like these tend to promote the economic dependency of women as opposed to men because of women's greater vulnerability to economic dependency. Tax

incentives for economic dependency create incentives for women to substitute non-waged work for waged work. The 'tax on marriage/cohabitation' imposes a direct tax penalty on the basis of relationships, and this penalty becomes one of the first after-tax costs of entering waged work that enters into the 'tax calculus' when women assess the rationality of labour force participation. This turns the 'tax on relationships' into a cost of forming adult relationships that also increases the economic dependency that is unfortunately a significant factor in this choice for women as a class. Because the scope of spousal treatment in federal law has expanded so rapidly in the past decade, the numbers of women affected by this provision and the types of relationships that are affected by it have grown considerably beyond the boundaries of traditional marriage.

A further effect of the 'tax on relationships' will be felt by women who are affected by race, disability, or sexuality. Women in these groups do not have the same options that heterosexual non-raced women have in countering the economic effects of the 'tax on relationships.' The choices posed by these joint penalties are more stark: women can either forego the relationship, which may exact a huge emotional and social toll even though it may not be a big factor in their personal economic functioning, or they can intensify their labour effort to compensate for the loss of these tax benefits because they cannot receive offsetting support from a partner who is also disadvantaged in terms of incomes by prejudice. Especially for lesbian women, the 'tax on relationships' becomes an additional factor forcing secrecy and perhaps even denial of lesbian identity as a strategy for survival. And for racially-identified or disabled women, the loss of valuable tax credits can make the difference between maintaining an important relationship and having to face life not only as a single parent, but as a complete isolated adult as well. Microsimulation of potential same-sex couples and of a larger class of non-conjugal co-residents suggests that for the year 2000, the aggregate loss in GST credits may be on the

order of $37.3 to $42.7 million. If all other non-conjugal couples were also affected by this joint penalty, the loss of benefits would of course be higher.[165]

II. Low-Income Cutoff Formulas

Many of the income tax and expenditure provisions that extend tax benefits to parents or couples are means-tested in various ways. Several provisions contain low-income cutoff clauses (LICOs). These provisions are designed to restrict eligibility for some spousal benefits to those people who need them the most by looking to income levels of the taxpayers claiming them. LICOs are found in direct social assistance legislation, old age spousal pension allowances, child benefits, the equivalent-to-married tax credit, the married tax credit, some of the transferable tax credits, the GST credit, child-care expense deductions, unemployment insurance, worker compensation, and medicaid provisions.

LICOs reflect the fact that all of these tax and direct benefits are, in effect, forms of social assistance. And, like social assistance, only low-income people should receive them. LICOs relate to the income taxation of adult relationships when couple incomes are aggregated in the process of determining whether a taxpayer falls within the LICOs or would be disqualified from receiving a benefit by virtue of total couple income.

LICOs for individual recipients of government benefits are not particularly controversial. But when LICOs are calculated and administered not only by reference to the income of the individual applicant but are further contingent on the incomes of other family members via

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165 See Appendix B for this data, calculated for 2000 using the SPSDM version 7.1.

'family income' concepts, many people who would qualify for benefits as individuals are denied benefits when their spouse's or cohabitant's income is large enough to take the couple or the family over the group-based LICO. The same effect can be seen with the 'tax on marriage' types of provisions.

From a policy perspective, the use of 'couple income' in applying LICOs and the use of 'tax on marriage' types of provisions to reduce benefits claimable by people in adult relationships are forms of joint taxation. As increasing numbers of provisions that use the couple to measure eligibility for tax benefits have been introduced into the income tax legislation, they have shifted income taxation further in the direction of partial joint taxation because they impose tax liability on coupled adults jointly rather than on the basis of individual incomes.

The beginnings of this form of joint taxation in Canada can be traced back to the insertion of income limits into the first child tax credit that replaced the universal family allowance. The family allowance had been paid to all mothers on an individual basis, calculated by a flat rate per child, and not affected by partner or spouse income. The federal government has pointed to the income aggregation and means-testing in the child tax credit whenever it introduces other joint penalties.[166]

The actual mechanics of LICOs can take various forms. Some LICO formulas merely look to the couple's aggregated incomes, so that an individual will receive social assistance if their own income falls below the relevant level, but will be denied assistance if their spouse's or cohabitant's income can be presumed to offset that low personal income. This is the 'spouse in

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166 See Department of Finance, *Technical Paper* -- GST (August 1989) for an example of this form of tax policy reasoning.

the house' approach associated with social assistance and declared to be unconstitutional in the *Falkiner* case.

Tax-based LICOs can work the same way: if an individual had income of $25,921 or less in 1993, then that person would have received the full federal child tax benefit of $1,020.[167] But if the individual were considered to be the spouse of a person whose income, when added to the individual's income, took him or her over that income threshold, then the individual would not be eligible for the credit at all, regardless of his or her own personal income. Similarly, the GST tax credit is ground down by 5 per cent of the extent to which family income exceeds the relevant LICO. When household or couple incomes are aggregated, they can grind down the already reduced GST credit faster for couples than would occur on the individual level, because couples have already lost the single supplement. The precise rate at which the remaining credit is lost depends, of course, on specific income levels.

The purpose of family- or couple-based LICOs is the same as the 'tax on marriage/ cohabitation': family income concepts force family members to turn first to each other for economic support, and then to the state only if the level of support they can receive from their family does not meet some minimum.[168] The expectation that family members will support each other is grounded in family law and reflected in criminal law.[169] From the point of view of women and members of disadvantaged groups, the ascribed spousal status given to cohabitants who either choose not to marry or who cannot by law marry creates factual pressure to become economically dependent in circumstances in which that dependency does not exist, or would not

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167 See ITA s. 122.6-122.64, introduced effective 1993. The 1993 amounts are adjusted to reflect changes in the cost of living measured by the Consumer Price Index each year.

168 See Department of Finance, *Technical Notes* -- Child Tax Benefit (May 1992).

169 Criminal Code, R.S.C. 1985, c. C-46, s. 215(1)-(4).

be desirable, or could not be legally enforced without considerably stretching and testing the law. This is illustrated in the *Poulter* case, in which a single mother lost the child tax credit she had received in previous years when she became a deemed spouse in 1993. When her cohabitant's income was added to hers, their combined income exceeded the child tax benefit LICO.[170] The taxpayer challenged this reassessment on the basis that her lover was not her spouse or her deemed spouse and had 'no relationship with the daughter, emotionally, morally, financially, or anything else' and that she remained solely responsible for her daughter in every way. She lost the challenge because of the literal language of the new spousal rules and because the court found that neither formally married couples nor opposite-sex cohabitants are disadvantaged groups.[171]

Like joint penalties that take the form of a 'tax on relationships,' joint income LICOs set women up to become economically dependent when this may not be their choice. Once economic dependency is established through the withdrawal of financial benefits to women, they are then more vulnerable to the substitution effect which further tends to allocate economically-dependent women to non-waged domestic work. These joint penalties do not affect all women uniformly. Heterosexual non-raced women have more choices in the face of lost benefits. The choices for women whose partners themselves have lower incomes because they are racially-identified, lesbian, or disabled are even starker: they can give up the relationship, or they can intensify their work effort even though they may have heavy child care or elder care responsibilities. Microsimulation of the impact of relationship recognition suggests that for the

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170 ITA s. 122.6; the LICO for 1993 was $25,921.

171 This decision pre-dated the Supreme Court of Canada decision in *Miron* v. *Trudel*, [1995] 2 S.C.R. 418 (S.C.C.), per McLachlin J., in which the Court ruled that opposite-sex cohabitants are disadvantaged groups, at least when compared with married couples.

year 2000, potential same-sex couples and a larger class of non-conjugal couples will lose at least $12.1 million in child tax benefits alone.[172]

III. Work-Related Expense Penalties

From the point of view of eliminating the regressive impact of taxation and benefit structures on women as a class, many of the effects of joint penalties can be ameliorated by giving low-income workers generous tax credits -- even refundable credits -- for unavoidable work-related expenses. At the very least, these expenses include child care and elder care expenses, but realistically, they also include increased self-care expenses, the costs of more formal clothing for work, unavoidable transportation costs, and the loss of joint benefits.

Not only has the Canadian federal government repealed the general employment deduction available to all taxpayers who earn employment income,[173] and which redressed some of the regressivity of employment taxation, but the only work-related deduction that is available to women is itself subject to both a 'tax on marriage/cohabitation' provision and a LICO. These two joint measures ensure, as a result, that only some of the most unavoidable of all work-related expenses are deductible. However, this deduction is structured in a way that reduces the tax benefit to the absolute minimum, and it is also constructed around the premise that only low-income and low-middle-income women 'really' need the child care expense deduction --

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172 See Appendix B for this data, calculated for 2000 using the SPSDM version 7.1.

173 The Department of Finance explained in Tax Reform White Paper (June 18, 1987) (Mr. Wilson) and *Tax Reform Supplementary Information* (December 16, 1987), implemented in Bill C-139 , S.C. 1988, c. 55, that 'the level established for the enhanced basic personal credit provides a greater tax benefit for individuals with lower incomes than would the personal exemption and the employment expense deduction combined.'

other women can actually afford to 'choose' to remain at home and care for their children themselves.

Quite apart from the fact that this is in fact not a genuine choice at all for many women, especially for women whose partners belong to disadvantaged groups, but it is a policy that is designed to interfere with women's long-term workforce attachment, and therefore undercuts women's formation of 'human capital' in the form of employability, opportunities for full-time work together with eligibility for valuable individual benefit packages, retirement funding, and income advancement.

The child care expense deduction achieves these effects by shifting the deduction between spouses depending on their relative income levels. A single individual can deduct the full amount of his or her child care expenses. But a married/cohabiting taxpayer can deduct the full amount only if two conditions are met: the combined income of the couple remains under the LICO applied to the deduction and the taxpayer's individual income is lower than the income of the taxpayer's spouse. If the partner's income is the lower of the two, then the partner is required to claim the deduction. This in turn reduces the amount of the tax benefit flowing from the deduction.[174]

This type of LICO is designed to measure benefits by reference to the 'need' of a coupled taxpayer. It appears to be allocated to an 'individual' member of a couple, but by forcing the spouse with the lower income to claim it, it ceases to be a individual benefit. This particular mechanism also reflects the expectation that one spouse will be the secondary income-earner whose decision to enter the waged labour force is contingent on the after-tax costs of child care.

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[174] ITA s. 63.

The structure of the ITA child care expense deduction increases the overall tax benefits of substituting non-waged domestic work for waged work, at the margin, at the same time that it directs limited tax benefits toward lower-income workers whose spouses cannot afford to support them. This effect, when combined with the 'upside down' effect of the child care expense deduction, renders that tax benefit highly violative of vertical equity.[175]

Policy alternatives: The policy alternatives that would redress the regressive impact of all of these joint penalties are the same: shift to the individual tax unit for calculating eligibility for tax benefit programs; increase LICOs to reflect actual cost of living levels; institute tests of actual as opposed to presumed economic dependence; offer earned-income tax credits to offset the effects of low secondary incomes.

> ***Recommendation 10: Repeal couple income tests attached to eligibility for tax benefits:*** Joint taxation elements such as the couple LICO in the child benefit or the 'marriage tax' in the GST benefit rates impose direct penalties on low-income taxpayers who are married or treated as spouses. Generous earned-income credits would further offset the regressivity of the tax/transfer system in this area.

IV. Anti-Avoidance Rules

Every income tax statute contains conflict of interest and anti-avoidance provisions. While automatic non-arm's length provisions, such as are found in the ITA, do not have to be framed in such wide terms, general conflict and anti-avoidance provisions are crucial to the efficient

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175 For further discussion of the history and distributional impact of the child care expense deduction rules, see Kathleen A. Lahey, '1995 Term -- Taxation Developments' (1996) 7 Supreme Court Law Rev. (2d) 381 at 415-416.

functioning of the revenue collection process.[176] Additionally, when the individual is the formal tax unit, as is the case in Canada, it is important to maintain boundaries around the individual that prevent collusive tax planning and tax-avoidance behaviour. However, federal legislation continues to go much further than is actually needed to counter avoidance and evasion. Attribution rules prevent equitable ownership to govern allocation of incomes between members of a married couple or cohabitants.[177] This in turn interferes with eligibility for a range of social security benefits, including Canada Pension Plan credits and unemployment insurance coverage.

As discussed in chapter four, some of the worst attribution rules affecting women have been repealed (the spousal salary and partnership rules). However, the long-term impact of those attribution rules is still being felt by women who were not permitted to accumulate their own CPP, RRSP, or RPP credits while they were working in family businesses. Although married women have been given the right to seek a share of their husbands' retirement credits under the CPP program, split benefits are far smaller than independent benefits. In addition, women who are not able to obtain a share of their husbands' credits before his death or before divorce have recourse to division of CPP credits when they themselves reach retirement age. Women in such a situation thus have no remedies of any kind for denial of CPP or other retirement credits.

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176 ITA s. 251 deems spouses to be 'related' for purposes of a huge number of specific anti-avoidance provisions, including for the purposes of the general anti-avoidance provisions in ss. 245 and 246.

177 Thus, for example, section 74.1 attributes income arising from investments transferred to a spouse back to the transferor spouse -- essentially deeming that income to remain the income of the transferor and not of the actual recipient. Other provisions that operate in this way are: s. 39 (capital gains on shares transferred to spouse included in income of transferor when realized); s. 74.2 (gains or losses on assets transferred to spouse treated as gains or losses of transferor); ss. 84.1, 85 (shares owned by spouse included in determination of control of corporation by other spouse); s. 97 (includes partnership interest of spouse in determination of whether other spouse is majority partner); s. 108 (contributions to trust by spouse of settlor treated as contributions by settlor); s. 146 (contributions to spousal RRSP withdrawn within three years treated as income of contributor).

The same problem faced by this class of women workers continues to be an issue in related contexts. Numerous other anti-avoidance provisions continue to prevent couples from transferring property among each other for income-splitting purposes.[178] In addition, zealous administrative assessment of women's contributions to family partnerships, businesses, and corporations[179] continues to impair women's abilities to develop their own retirement and employment insurance entitlements.[180]

Policy alternatives: Joint penalties should be replaced with tests designed to identify genuine economic autonomy, and should permit low-income taxpayers deprived of benefit coverage earlier in their lives to demonstrate contributions on an equitable level, especially in relation to CPP contributions.

> ***Recommendation 11: Bring presumptions about inter-couple transactions into line with equitable doctrine relating to family property:*** The benefits of individual taxation for low-income taxpayers are so clearly superior to those of joint taxation that it would be a serious policy error to replace individual taxation with joint taxation out of concern for the impact of anti-avoidance transactions. The present system of attribution rules comports with the integrity of the use of the individual as the tax base, but the tendency to view women as being mere puppets in such transactions should be replaced with equitable principles of family property ownership.

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178 See ITA ss. 60 and 146 (RRSPs), ss. 146.3-147 (other pension-type benefits), s. 96 (partnership interest), s. 148 (life insurance policies), s. 248 (death benefits).

179 See, for example, *Dollar* v. *Canada* (M.N.R.), [1997] T.C.J. No. 757 (T.C.C.), per Mogan T.C.J. (online: QL db TCJ), in which a step-son's application for unemployment insurance benefits was denied because the M.N.R. concluded on the basis of *Income Tax Act* s. 251, which applies also to employment insurance legislation, that the step-son did not deal at arm's length with his step-father's corporation to be considered to be an employee. Thus, he was considered not to have insurable employment. The same reasoning is applied even more stringently in relation to women employed in family businesses.

180 For an informative analysis of the long-term impact of this administrative attitude on the development of women's property rights, see Carolyn C. Jones, 'Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s' (1988) 6 Law and History Review 259.

Recommendation 12: The federal government should offer restitution to women affected by the now-repealed family business attribution rules: Many older women in Canada now have no CPP/QPP benefits because they were not permitted to treat their incomes from family businesses as their own for these purposes, or because their spouses refused to pay them non-deductible salaries. These statutory rules unjustly enriched their spouses and also unjustly enriched the federal government, which should lead to restitution.

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APPENDIX A

FAMILIAL TERMS IN THE INCOME TAX ACT

Provisions relating *solely* to 'related' and 'parent' corporations are not listed.*

Word Searched	Related Person	Spouse	Parent	Child	Brother/ Sister	Grand-Parent	Aunt/ Uncle	Niece/ Nephew	Family
Provision									
6	X			X					
8	X	X							
12	X								
13	X								
15	X								
17	X								
20.01		X							
24		X							
39		X							
40		X	X	X					X
44	X								
45		X							
51	X								
54	X	X		X	X				
54.1		X							
55					X				
56		X		X					
56.1			X	X					
58		X							
60	X	X		X					
60.01		X							
60.1		X	X	X					
62		X							
63		X	X	X					
64		X							
64.1				X					
70		X	X	X					X

Word Searched	Related Person	Spouse	Parent	Child	Brother/ Sister	Grand-Parent	Aunt/ Uncle	Niece/ Nephew	Family
72		X							
73		X		X					X
74.1		X						X	
74.2		X							
74.5		X						X	
75.1				X					
80.4	X	X							
81	X	X							X
82		X							
84	X								
84.1		X		X					
94							X	X	
96		X							
104		X	X	X	X	X	X	X	
107		X							
108		X	X						
110.6		X	X	X					X
118		X	X	X	X	X	X	X	
118.2	X	X							
118.3		X	X	X		X			
118.5			X						
118.61		X	X			X			
118.62	X								
118.8		X							
118.9		X	X			X			
122.5		X	X	X					
122.6		X	X	X					
122.61		X							X
122.62		X		X					
126		X							
127	X								
127.4		X							
130	X	X		X					
130.1	X	X		X					
143		X		X					X
146		X		X					

Word Searched	Related Person	Spouse	Parent	Child	Brother/ Sister	Grand-Parent	Aunt/ Uncle	Niece/ Nephew	Family
146.01		X							
146.02		X							
146.1		X	X					X	
146.3		X		X					
147	X	X							
147.3		X							
148		X		X					
149									X
150		X							
160		X							
160.1		X							
163		X							
180.2		X							
191				X			X	X	
204.2		X							
204.8	X								
204.81		X							
204.9		X	X						
210		X							
212		X							
212.1	X	X		X					
221		X							
233.2	X						X	X	
241				X					X
248	X	X		X					
250		X		X					X
251*	X	X	X	X	X	X	X	X	
251.1		X							
252		X	X	X	X	X	X	X	
256			X	X					

APPENDIX B

	Tight screen			Loose screen		
	Status quo (base)	As same-sex couples (variant)	Change in amounts	Status quo (base)	As same-sex couples (variant)	Change in amounts
Market income (M)	$ 7,834.6	$ 7,834.7	$ 0.1	$ 8,500.2	$ 8,500.3	$ 0.1
All transfer income (M)	$ 871.6	$ 749.6	$ (122.0)	$ 1,169.9	$ 1,023.9	$ (146.0)
Federal transfer income (M)	$ 354.0	$ 288.1	$ (65.8)	$ 518.1	$ 444.5	$ (73.6)
Provincial transfer income (M)	$ 517.6	$ 461.4	$ (56.2)	$ 651.8	$ 579.4	$ (72.4)
All taxes (M)	$ 2,647.3	$ 2,614.2	$ (33.1)	$ 2,870.5	$ 2,834.3	$ (36.3)
Federal taxes (M)	$ 1,705.5	$ 1,688.6	$ (16.9)	$ 1,850.7	$ 1,832.0	$ (18.7)
Provincial taxes (M)	$ 941.6	$ 925.6	$ (16.0)	$ 1,019.7	$ 1,002.3	$ (17.3)
Federal taxes less transfers (M)	$ 1,351.6	$ 1,400.5	$ 48.9	$ 1,332.6	$ 1,387.5	$ 54.9
Provincial taxes less transfers (M)	$ 424.0	$ 464.1	$ 40.1	$ 367.9	$ 422.9	$ 55.0
Federal transfer income (M)	$ 354.0	$ 288.1	$ (65.8)	$ 518.1	$ 444.5	$ (73.6)
Total Federal Child Benefits (M)	$ 23.6	$ 11.6	$ (12.1)	$ 24.5	$ 12.0	$ (12.5)
OAS benefits (M)	$ 58.2	$ 58.3	$ -	$ 80.1	$ 80.2	$ -
GIS benefits (M)	$ 33.2	$ 18.2	$ (15.0)	$ 50.8	$ 33.9	$ (17.0)
Spouse's allowance (M)	$ -	$ -	$ -	$ -	$ -	$ -
Federal social assistance (M)	$ -	$ -	$ -	$ -	$ -	$ -

	Tight screen			Loose screen		
	Status quo (base)	As same-sex couples (variant)	Change in amounts	Status quo (base)	As same-sex couples (variant)	Change in amounts
Federal sales tax credit (M)	$ 60.3	$ 23.1	$ (37.3)	$ 73.0	$ 30.3	$ (42.7)
Unemployment InsuranceEmployment Insurance benefits (M)	$ 10.9	$ 10.9	$ -	$ 15.8	$ 15.8	$ -
CPP/QPP payable (M)	$ 114.5	$ 114.5	$ -	$ 145.7	$ 145.8	$ -
Quebec tax abatement (refundable) (M)	$ 0.1	$ 0.1	$ -	$ 0.1	$ 0.1	$ -
Other taxable demogrants (M)	$ -	$ -	$ -	$ -	$ -	$ -
Other SA or guarantees (M)	$ -	$ -	$ -	$ -	$ -	$ -
Provincial transfer income (M)	$ 517.6	$ 461.4	$ (56.2)	$ 651.8	$ 579.4	$ (72.4)
Provincial family programs (M)	$ 1.1	$ 1.7	$ 0.5	$ 1.4	$ 1.7	$ 0.3
Provincial social assistance (M)	$ 439.2	$ 439.2	$ -	$ 548.1	$ 548.1	$ -
GIS provincial top-up (M)	$ 0.6	$ -	$ (0.6)	$ 0.6	$ 0.2	$ (0.3)
Refundable provincial tax credits (M)	$ 76.5	$ 20.5	$ (56.0)	$ 101.6	$ 29.4	$ (72.2)
Federal taxes (M)	$ 1,705.5	$ 1,688.6	$ (16.9)	$ 1,850.7	$ 1,832.0	$ (18.7)
Federal income tax payable (M)	$ 949.6	$ 938.2	$ (11.4)	$ 1,017.1	$ 1,005.2	$ (11.9)
Basic federal tax (M)	$ 982.1	$ 969.9	$ (12.2)	$ 1,051.4	$ 1,038.7	$ (12.7)
Federal tax reduction (M)	$ -	$ -	$ -	$ -	$ -	$ -
Quebec tax abatement (applied) (M)	$ 31.3	$ 30.5	$ (0.8)	$ 32.9	$ 32.1	$ (0.8)
Other federal tax credits applied (416) (M)	$ 3.7	$ 3.7	$ -	$ 3.7	$ 3.7	$ -
Federal surtax (M)	$ 4.3	$ 4.2	$ -	$ 4.3	$ 4.3	$ -

	Tight screen			Loose screen		
	Status quo (base)	As same-sex couples (variant)	Change in amounts	Status quo (base)	As same-sex couples (variant)	Change in amounts
UIC contributions (M)	$ 149.4	$ 149.5	$ 0.1	$ 161.8	$ 161.9	$ 0.1
CPP/QPP contributions (M)	$ 217.7	$ 217.9	$ 0.1	$ 236.1	$ 236.2	$ 0.2
Social Benefits Repayments (M)	$ 0.1	$ 0.1	$ -	$ 0.1	$ 0.1	$ -
Federal commodity taxes (M)	$ 388.3	$ 382.9	$ (5.4)	$ 435.2	$ 428.5	$ (6.7)
Provincial taxes (M)	$ 941.6	$ 925.6	$ (16.0)	$ 1,019.7	$ 1,002.3	$ (17.3)
Provincial income tax payable (M)	$ 568.2	$ 557.7	$ (10.5)	$ 603.1	$ 592.5	$ (10.6)
Provincial commodity taxes (M)	$ 373.3	$ 367.9	$ (5.4)	$ 416.4	$ 409.8	$ (6.7)
Disposable income (M)	$ 6,821.0	$ 6,721.0	$ (100.0)	$ 7,651.6	$ 7,528.1	$ (123.5)
Consumable income (M)	$ 6,059.0	$ 5,970.1	$ (88.8)	$ 6,799.6	$ 6,689.9	$ (109.7)

Numbers by Gender and Income - Canada 2000

Tight Screen:

	Gender of Couple				
Base total income group	Male (000s)	Female (000s)	Both	Males (%)	Females (%)
Min-20000	14.5	5.6	20.1	15%	9%
20001-30000	13.2	11.6	24.8	14%	18%
30001-40000	12.0	10.4	22.3	12%	16%
40001-50000	14.6	5.9	20.5	15%	9%
50001-60000	5.8	9.2	15	6%	14%
60001-75000	14.8	9.1	23.9	15%	14%
75001-100000	11.7	8.4	20.1	12%	13%
100001-Max	9.6	5.4	15	10%	8%
All	96.1	65.5	161.6	100%	100%

Loose Screen:

	Gender of Couple				
Base total income group	Male (000s)	Female (000s)	Both	Males (%)	Females (%)
Min-20000	23.0	10.3	33.3	20%	14%
20001-30000	15.8	12.3	28.1	14%	16%
30001-40000	14.8	12.5	27.3	13%	16%
40001-50000	16.2	6.6	22.8	14%	9%
50001-60000	8.5	10.9	19.4	7%	14%
60001-75000	15.5	9.7	25.1	13%	13%
75001-100000	12.8	8.4	21.2	11%	11%
100001-Max	9.8	5.4	15.1	8%	7%
All	116.3	76.0	192.3	100%	100%

APPENDIX C

TAX UNIT MODELS, JOINT AND INDIVIDUAL, 1996

Country	Original family property regime	Present family property regime	Original income tax unit	Present income tax unit	Employment rate of married women	Opposite - sex cohabitants recognized	Lesbian and gay couples recognized
Sweden	Community property	deferred community	Joint	individual with few relationship provisions	80%	yes	yes
U.K.	Individual	individual	Joint	individual with many relationship provisions	71%	no	no
Canada	Common-law provinces: individ.ual Québec: community property	deferred community or community property	Individual	individual with numerous relationship provisions	58%	yes	yes (Bill C-23)
Spain	Community property	community property	Joint	joint with optionl aggregation	26%	no	no
U.S.	individual or community property	more individual and fewer community property	Individual	joint with optional income splitting	68%	no	no
France	Community property	community property (elective)	Joint	joint with full family income splitting	57%	yes	yes

Sources: Organization for Economic Development, *Taxation in OECD Countries* (Paris: OECD, 1993); Naomi Neft and Ann D. Levine, *Where Women Stand: An International Report on the Status of Women in 140 Countries, 1997-1998* (N.Y.: Random House, 1997), 492-94.

APPENDIX D

AVERAGE INCOMES BY RACE AND GENDER, 1996

Race / ethnic origin	*Men*	*Women*
Southeast Asian	$27,605	$17,851
Filipino	$23,385	$19,021
Arabic/West Asian	$25,532	$16,552
Japanese	$42,277	$22,804
Korean	$23,164	$15,818
Chinese	$27,509	$19,952
Black	$23,320	$18,610
Average of all above	$31,917	$20,162
First Nations/on reserve	$14,711	$13,447
First Nations/off reserve	$22,144	$15,559
Non-visible minority	$43,162	$29,074

Source: Statistics Canada, *Dimensions* (Ottawa: Statistics Canada, 1996); Statistics Canada, *The Daily* (Ottawa: Statistics Canada, 1998).

APPENDIX E

PREDICTED INCOME DIFFERENCES FOR COUPLE TYPES, U.S., 1990

	Lesbian couples	Gay couples	Cohabiting heterosexuals	Married couples
Household income	$37,754	$45,777	$41,530	$46,721
Individual men	--	$18,462	$18,213	$24,450
Individual women	$15,823	--	$10,611	$9,866

Source: Klawitter and Flatt, *Earnings*, tables 2 and 4, using 'private employment' lines.

APPENDIX F

INCOME TAX SUBSIDIES FOR SUPPORT OF ECONOMICALLY DEPENDENT SPOUSE, 1999

Provision	***Description***
Provisions that are expressly conditioned on specific income levels:	
118(1)(a)	Credit for support of spouse
Provisions that can be claimed by supporting spouse if lower income spouse cannot use them:	
118.8	Transfer of unused tax credits to spouse, which include the following:
118.5	Tuition credit
118.6	Education credit
118(2)	Age credit
118(3)	Pension income credit
118.3(1)	Mental/physical impairment credit
Provisions that will apply when difference in incomes of spouses results in agreement or court order for payment of support:	
56, 60	Shifts income tax liability for alimony payments to recipient

Source: *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended for the 1999 taxation year.

APPENDIX G

TAX PROVISIONS THAT PROVIDE OR MAGNIFY 'FAMILY WAGES' FOR COUPLES, 1999

Provision	***Description***
Provisions that make it possible to split incomes or shift deductions between spouses:	
8	Deduction for cost of maintaining home for spouse (railway workers)
62, 64	Costs of moving spouse's personal property can be deducted as part of 'household' moving expenses
104, 108	Income splitting by way of use of trust
118.2	Credits for payment of medical expenses of spouse
118.2(2)(q)	Credits for payment of premiums for medical insurance covering spouse
146	Taxpayer can receive tax deductions for contributions to spouse's RRSP
146	Joint and survivor benefits can be paid out of RRSP assets
Reg. 8501	Permits redirection of RPP benefits to separated or divorced spouse
Provisions that shelter benefits to spouses from taxation:	
6	Tax exemption for employee benefits that extend to spouse (dental, medical, counselling)
15	Tax exemption for employee shareholder loan taken out to provide housing for spouse

Provision	Description
248(1)	Tax-exempt payment of up to $10,000 death benefit to spouse
Provisions that organize and/or subsidize survivor pensions:	
60(j.2)	Surviving spouse can roll deceased spouse's RPP or DPSP into own RRSP
146.3	Surviving spouse benefits can be paid out of retirement income funds (RIFs)
Reg. 8503, 8506	Surviving spouse benefits can be paid out of RPPs

Source: *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

APPENDIX H

INCOME TAX PROVISIONS RELATING TO SHARING INCOME OR PROPERTY WITH SPOUSE, 1999

Provision	***Description***
Provisions that make it possible to transfer assets between spouses without tax liability:	
24	Tax-deferred rollover for transfer of eligible capital property to spouse
40	Tax-deferred rollover for transfer of farming property to spouse
40	Capital gain on home held in trust for spouse can be tax exempt under principal residence exemption
54	Capital gain on home owned by one spouse for use and occupation by other spouse exempt from taxation as principal residence
60(j.2)	Tax-deferred rollover for transfer of funds from registered pension plan or deferred profit sharing plan to spousal RRSP
70	Tax-deferred rollover for transfer of property to surviving spouse or spousal trust
70, 73	Tax-deferred rollover for transfer of farming property used by spouse
73	Tax-deferred rollover for transfer of capital assets to spouse or spousal trust during life
74.5	Tax-deferred rollover for transfer of capital assets to spouse living apart

Provision	*Description*
96	Non-recognition of partnership income and gains when spouse takes over other spouse's partnership interest
146	Tax-deferred transfer of RRSP assets to surviving spouse's RRSP
147	Tax-deferred rollover of spouse's deferred profit sharing plan (DPSP) to other spouse's own registered plans
47.3	Tax-deferred rollovers from deceased or separated spouse's registered pension plan (RPP) to other spouse's own RRSP, or DPSP
148	Tax-exempt transfer of life insurance policies between spouses
Provisions that make it possible to transfer tax benefits from one spouse to another:	
104	Flow-through of tax benefit items where property held in spousal trust, but income is paid to spouse personally
110.6	Flow-through of enhanced capital gain exemption where property rolled over to spouse

Source: *Income Tax Act*, R.S.C.1985, c. 1 (5th Supp.).

APPENDIX I

ABOUT THE SPSD/M (SOCIAL POLICY SIMULATION DATABASE AND MODEL):

The SPSD/M was developed by Statistics Canada to analyze the financial interactions of governments and individuals in Canada. It allows the assessment of the cost implications or income redistributive effects of changes in the personal taxation and cash transfer system.

This tool contains a database of information on individual taxes paid and cash transfers from government, a static accounting model that processes each individual using algorithms that simulate legislated or proposed programs, data retrieval and reporting software, and user documentation.

All assumptions and calculations underlying the simulation results reported in this study were prepared by Jeff Silver, Andrew Mitchell, or Brian Murphy, and the responsibility for the use and interpretation of these data is entirely that of the author.